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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 73-74

FEDERAL MARITIME BOARD,
Petitioner,
v.
ISBRANDTSEN COMPANY INC., UNITED STATES OF AMERICA, ET AL.,
Respondents

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE, MITSUI STEAMSHIP CO., LTD., ET AL.
Petitioners,
v.
UNITED STATES OF AMERICA, ET AL.,
Respondents

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT, ISBRANDTSEN COMPANY, INC.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 73

FEDERAL MARITIME BOARD,

Petitioner,

v.

ISBRANDTSEN COMPANY, INC., UNITED STATES OF AMERICA, AND SECRETARY OF AGRICULTURE,

Respondents.

No. 74

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE, MITSUI STEAMSHIP CO., LTD., ET AL.

Petitioners,

v.

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, ISBRANDTSEN COMPANY, INC. AND SECRETARY OF AGRICULTURE,

Respondents

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT, ISBRANDTSEN COMPANY, INC.

Opinion Below

The opinion of the Court of Appeals (R. 237-248) is reported at 99 U.S. App. D.C. 312, 239 F. 2d 933.

Jurisdiction

The judgment below was entered on November 9, 1956. Petitions for writs of certiorari were filed by the Federal Maritime Board on January 24, 1957, and by the Japan-Atlantic and Gulf Freight Conference and its member lines on February 1, 1957, and were granted on March 25, 1957 (351 U.S. 994; 353 U.S. 908).[1] The judisdiction of this Court is conferred under 62 Stat. 928, 28 U.S.C. § 1254(1).

Statutes Involved

The statutes and sections of the Constitution involved are the Shipping Act, 1916, as amended, 46 U.S.C. § 801 et seq., the Constitution of the United States, Article 1, § 8, par. 18 and Amendment V, and the Sherman Anti-Trust Act, 15 U.S.C. §§ 1, 2. The relevant sections of these statutes and of the Constitution are set forth in Appendix A to this brief.

Questions Presented

The conference practice under review, which the Court of Appeals has by its decision condemned as illegal, is the so-called exclusive patronage contract/non-contract dual rate system (hereinafter sometimes referred to as the "exclusive-patronage system" or the "*pre*ferred-rebate system"), under which common-carrier members of a steamship conference, acting in concert, charge one set of rates to shippers who agree

[1] Isbrandtsen is replying in this Brief to the respective Briefs of the Federal Maritime Board and the Conference, which Briefs together total some 168 pages. All emphasis appearing in quotations herein has been supplied.

to ship all of their cargo exclusively on the vessels of the Conference lines (i.e. to boycott all non-conference carriers) and charge an arbitrarily-fixed higher set of rates for identical transportation services to shippers who do not enter into such exclusive-patronage contracts, the admitted and avowed purpose of said system being the elimination of non-conference or independent competition and the monopolization of the trade by the conference lines.

The following questions concerning this system were presented to the Court of Appeals:

> "1. Whether the employment of the so-called exclusive patronage contract/non-contract dual rate system under which common-carrier members of a steamship conference acting in concert, charge one set of rates to shippers who agree to ship all their cargo exclusively on the vessels of the conference lines, and charge a higher set of rates for identical transportation services to shippers who do not enter into such exclusive patronage contracts is unlawful under, or in violation of sections 14, 15, 16, and/or 17 of the Shipping Act, 1916, so that the Federal Maritime Board under section 15 of said Act, lacks authority to approve an agreement, understanding or arrangement entered into by the members of such a conference for the use of such a system?
>
> 2. Whether such a system violates the various provisions of the Anti-Trust laws or any other pertinent statutes, including the question whether the system could ever be legally approved under section 15 of the Shipping Act, because that

section can exempt from the Anti-Trust laws only agreements between carriers and "other persons" subject to the Act, whereas the fundamental part of this system is a so-called exclusive patronage contract between conference lines and shippers, who are neither carriers nor "other persons" subject to the Act?

3. Whether the Board could, in any event, approve the use of the exclusive-patronage-contract-dual-rate system in the particular trade herein involved on the basis of the facts existing in the administrative record as found by the Board itself?

4. Whether the Board, in approving such a system under section 15 of the Shipping Act even assuming the legality of such a system, must have before it a clearly stated "agreement" or "understanding" between the common carriers involved, including the actual rates which would be charged by such conference carriers pursuant to their concerted action?

5. If section 15 of the Shipping Act, 1916, should authorize the Board to approve such a system, whether such section of the Act would thereby be rendered unconstitutional under the Due Process clause or other provisions of the Constitution by reason of the fact that it would give the Board and/or Conference the power to force the independent carrier or carriers either out of the trade or into the conference and/or permanently prevent independent competition from entering the trade by making non-conference competition economically impossible?"

The Court of Appeals found it unnecessary to go beyond the issues in Question 1, in view of its holding that the system was fundamentally illegal under Section 14, Third of the Shipping Act. Even under this first question, the Court below did not decide, therefore, the serious challenge of illegality under Sections 15, 16, and 17 of that Act. We stress to this Court the importance of those remaining issues under Question 1, as well as the importance of the issues raised in the succeeding questions, particularly questions 2 and 5.

Statement of Case

A. Background of the Controversy

Isbrandtsen has long contended that the admitted and basic facts concerning the exclusive-patronage system present a situation whereunder the use of that system would be unavoidably illegal under the Shipping Act, 1916, as amended, as well as in violation of various other statutes and the Constitution of the United States. For purposes of presenting the issues of law in their simplest form, Isbrandtsen entered into a stipulation, in the Court below, to limit the facts, for purposes of review, to those "existing in the administrative record as found by the Board itself" (R. 229-235), even though the Board's decision was in favor of the use of the exclusive-patronage system by the Conference, and even though Isbrandtsen has contested the validity of many of the Board's findings.

The present case is the culmination of lengthy and expensive efforts by Isbrandtsen to present these legal issues to the Courts for final and definitive decision.

For the last ten years, Isbrandtsen has been attempting to obtain such a decision of the legality or illegality of the exclusive-patronage system, which decision has now been rendered by the Court below. In these efforts, Isbrandtsen has been joined by the United States Departments of Justice and Agriculture, which departments have similarly contended that the system is fundamentally illegal.

The faulty and inadequate administrative procedures of the Federal Maritime Board have made it exceedingly difficult to present the basic legal issues to the Courts. Isbrandtsen and the Departments of Justice and Agriculture have been confronted with a situation, perhaps not uncommon in regulatory agencies, where powerful members and combines of the industry to be regulated in effect have secured undue attention in the framing by the agency of its policies and decisions. The Board accordingly has consistently denied the necessity of regulating these powerful and foreign-controlled steamship monopolies and has even disclaimed its power to do so.[2]

Throughout the many years of this litigation, both before the Board and the Courts, the Board has been the most outspoken supporter of the system, and has actively endorsed and espoused the system in every case

[2] During the period when various formal adjudicatory proceedings have been pending before the Board, certain Board Members, including the present Chairman, have made various public statements and speeches to industry groups in favor of the exclusive-patronage system. The Board's statements on the subject have lacked any consistency but an attitude favoring non-regulation of steamship conferences has long been evident. See *infra*, pages 139 to 147.

that has gone to Court, rather than appearing merely as *amicus curiae*.

Confronted with this anomalous situation of administrative inertia, plus preconceived opposition, it has not been easy to compel the Board to go through even the formalities of an adequate administrative hearing so as to present a proper case for judicial review. Since 1947, it has been only the relentless efforts of Isbrandtsen and the Departments of Justice and Agriculture that have been responsible for Court decisions forcing the Board to go through some perfunctory—though unavailing—gyrations in the regulation of these shipping cartels.

At the outset of its attack in the Courts against the use of the exclusive-patronage system, Isbrandtsen was confronted with the necessity of exhausting its administrative remedies before the Board. In *Isbrandtsen Company v. United States*, 81 F. Supp. 544 (S.D.N.Y., 1948), an injunction was granted to Isbrandtsen by a three-judge Statutory Court, restraining a Board order, issued without hearing, purporting to allow the Eastbound and Westbound North Atlantic Continental Conferences to institute the system, which injunction was conditioned upon Isbrandtsen's diligent prosecution of a complaint before the Board. An appeal by the *Board* and the Conferences to this Court was dismissed sub nom. *A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Company*, 336 U. S. 941 (1949). After lengthy proceedings before the Board, upon Isbrandtsen's complaint, the Board's decision dismissing the complaint was held invalid by the Statutory District Court because of the Board's obvious and fatal failure

to make constitutive, basic, or pivotal findings, which would support its conclusion. *Isbrandtsen Company* v. *United States*, 96 F. Supp. 883 (S.D.N.Y., 1951), affirmed by an equally divided Court, sub nom. *A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Company*, 342 U. S. 950 (1952).

In the previous judicial proceedings in this case, the Board, which sought to allow the system to go into effect without any opportunity for hearing, had argued that an agreement between conference carriers to employ the exclusive-patronage system was not an agreement under section 15 of the Shipping Act and required no Board approval for its effectiveness. This remarkable contention by the Board was quickly dispelled, and an injunction against the use of the system was issued by the Court of Appeals for the District of Columbia Circuit until the Board had met its formal statutory requirements of holding a hearing and issuing its approval or disapproval of what was obviously an agreement, *Isbrandtsen* v. *United States*, 211 F. 2d 51 (D. C. Cir., 1954). Once again, petitions for certiorari to this Court by the Board and the Conference were denied, sub nom., *Japan-Atlantic and Gulf Freight Conference, et al.* v. *United States, et al.*, 347 U. S. 990 (1954).

The Court decisions have had little effect upon the Board, other than various meaningless verbalizations in its Reports and some rather absurd regulations adopted in a frantic and obvious effort to meet what it considered the mere formal requirements of administrative action as announced therein. After the affirmance of the decision of the Statutory District Court in *Isbrandtsen Company* v. *United States, supra*, and in

purported compliance with that decision, the Board promulgated its General Order 76, 46 C.F.R. 236 (November 10, 1952), requiring in substance that Conferences using or seeking to use the system state the basis for the spread or differential and the reasons for the use of the system in the particular trade involved. The spreads used by the sixty-two (62) Conferences employing the system vary, in percentages from 9½ to 31 per cent, and in flat dollars per ton of cargo from $3 to $9.[3] It was contemplated by the Board, that such filings of self-serving *ex parte* statements by the conferences would somehow satisfy the decision of the Statutory District Court and obviate any necessity of approving the agreements involved. No action was ever taken by the Board in reference to said sixty-two (62) filings. They were simply marked "Filed". This fantastic attempt to "approve" by inaction, or "implication"—a traditional approach by the Board, of course—was dispelled in the previous appeal to the Court of Appeals involving the present conference, *Isbrandtsen v. United States, supra.*

Administrative proceedings under the Board's General Order 76, although lengthy and expensive, have been futile, amounting to little more than an incantation by Conference witnesses that the system was needed to eliminate and prevent independent competition and to allow conference carriers to maintain

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[3] Some conferences using the system employ a flat dollar differential between contract and non-contract rates irrespective of the rates involved. Other conferences use a particular arbitrarily selected percentage for the differential which means that the dollar amount of the spread will vary as between different commodities having different rates.

stable and uniform rates,[4] a result which any monopoly can obviously effectively achieve. As to the "basis of the spread", the usual support was that the percentage or differential represented the "best business judgment" of the conference and carriers involved.

The Board's compliance with the decision of the Court of Appeals, however, holding that every exclusive-patronage system was an "agreement" requiring Board approval before it could be used, has not been the subject of even such minimal formal acceptance of attention by the Board. Except for this very case now before this Court, where the Conference is under a permanent injunction not to use the system, the Board has taken no steps whatsoever to comply with the decision of the Court of Appeals, which was affirmed by this Court. In one other case, the Board has approved the use of the system, by the North Atlantic Continental Freight Conference, after hearing on the protests by the Departments of Agriculture and Justice and by

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[4] Testimony in these proceedings before the Board on behalf of the conferences has been largely confined to conference officials or employees or officers of the member lines. Only occasionally have shipper witnesses appeared, a result which is not surprising in view of the tremendous economic pressures wielded by these powerful conferences. The reluctance of independent shippers to testify against these powerful shipping cartels has been well known (See footnote 26, *infra*, p. 40). Nevertheless, in Board Dockets 725, 751, involving a complaint against the system instituted by the Secretary of Agriculture, officials of the United States Department of Agriculture, the largest shipper in the world, and representatives of five farm organizations, representing hundreds of thousands of American shippers, appeared to testify in opposition to the system. *Secretary of Agriculture* v. *N. Atlantic Continental Freight Conf.*, 4 F.M.B. — (1956). Such testimony in opposition to the system has been given no weight whatsoever by the Board (See infra, p. 39).

Isbrandtsen. *Secretary of Agriculture* v. *North Atlantic Continental Freight Conference*, 4 F. M. B. — (1956). That case is now pending review sought by the Secretary of Agriculture in the United States Court of Appeals for the District of Columbia Circuit. Despite the decision of the Court of Appeals, requiring Board Approval of all such agreements, the anomalous situation exists where the Board allows some sixty-one (61) conferences to use the system, without Board approval, in direct contravention of that decision, and two almost contemporaneous decisions concurring with that decision, *Pacific Westbound Conference* v. *Leval*, 269 P. (Ore.) 2d 541 (1954) and *River Plate and Brazil Conference* v. *Pressed Steel Car Co.*, 222 F. 2d 369 (C.A. 2, 1955). Isbrandtsen has repeatedly complained about this flagrant disregard of the law by the Board but has received no intelligent reply and no action whatsoever. Sixty-two (62) conferences presently use the exclusive-patronage system, or about half of the conferences on file with the Board, and to Isbrandtsen's knowledge, only one of these conferences has ever had its agreement to use such system approved by the Board —a matter readily ascertainable by the Board from its files—and, as pointed out above, that one approval is under review upon the Petition of the Secretary of Agriculture in the Court of Appeals for the District of Columbia Circuit. In other words, all of these conferences are presently employing the system illegally without even the color of formal Board approval.

The Board's reluctance and refusal to follow the decisions of the Courts is not surprising, for it does not even follow its own decisions, which have been conflict-

ing and inconsistent.[5] It has repeatedly emphasized that the exclusive-patronage system could only be used where competitive conditions presented by non-conference carriers so warranted. *Japan-Atlantic and Gulf Freight Conference*, 4 F. M. B. — (December 14, 1955); *Trans-Pacific Freight Conference of Japan*, 4 F. M. B. — (December 19, 1955). The Affidavit of Lloyd Tibbott, Chief of the Board's Regulation Office, filed with the Court of Appeals in this proceeding, however, states that only eight (8) of the sixty-two (62) conferences using the system have any independent competition whatsoever.[6] Mr. Tibbott's Affidavit is dated December 23, 1955. Since that time, there has been a further attrition of even the exceedingly minor independent competition that was listed therein. The Mitsui Steamship Company, a Petitioner herein, listed as a non-conference operator in the "Pacific Coast-Europe" trade has since joined the Conference, as has the other independent operator in that trade. Isbrandtsen, moreover, which is listed as an independent operator in the Atlantic-Malay States, Atlantic-Far East, and Pacific Coast-European trades carries virtually no cargo in those trades. Of the sixty-two (62) conferences using the exclusive patronage system, therefore, only seven (7) have even a claim that there is independent competition. In the face of such facts, the verbal and meaningless plea, reiterated on pages 31 and 32 of the Board's Brief, that the Board

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[5] See pages 139 to 147, *infra*.

[6] The Affidavit of Mr. Tibbott lists ten (10) trades in which the system is used, but four of these so-called trades are controlled by only two (2) conferences.

will protect Isbrandtsen and other independents is the sheerest and most patent nonsense. Once independent competition has been eliminated, it is usually gone for good, and the Board sits back in its traditional complacency of non-regulation, adopting a policy of what it has consistently referred to as conference "self-regulation." This "self-regulation" of course, amounts to the predatory destruction and perpetual suppression by the monopolists of all non-conference carriers. How well they have succeeded is illustrated by the figures above supplied by the Board's Chief of Regulation.

This is the background in which the present proceeding arises, with the present case constituting the culmination of years of fruitless protests by Isbrandtsen and the Departments of Justice and Agriculture within the morass of administrative rigmarole and inertia.

B. The Parties.

Respondent, Isbrandtsen Company, Inc., is a domestic corporation, organized under the laws of the State of New York, and is an operator of many vessels of United States-flag and registry. As a part of its Eastbound Round-the-World Service, in which Isbrandtsen employs United States-flag vessels exclusively in the conduct of its common-carrier service, its vessels offer a regular fortnightly service for the carriage of cargo from Japan, Korea and Okinawa to ports on the Atlantic Coast of the United States.[7] Isbrandtsen, by its own choosing, has maintained a policy of not en-

[7] Neither the vessels of the Conference nor the vessels of Isbrandtsen, of course, engage in this trade alone. Isbrandtsen's vessels, operating on its Eastbound Round-the-World Service, proceed from

tering into so-called "conference agreements" with other carriers concerning the fixing or regulating of transportation rates or fares or concerning the controlling, regulating, preventing, or destroying of competition among the members of such conferences.

In Isbrandtsen's freight service from Japan, Korea and Okinawa to the Atlantic Coast of the United States, the company competes for cargo directly with Petitioners, the members of the Japan-Atlantic and Gulf Freight Conference (hereinafter called "the Conference"), a private association of seventeen *common-carrier* steamship lines, having its principal office in Japan. The Conference is composed of twelve foreign-flag lines (eight of which are Japanese), and although nominally there are five United States-flag members, one of them serves Gulf ports only, another returns in ballast (without cargo) and another returns to the United States via the Suez Canal, which longer route is a detriment to the carrying of any cargo from the Far East ports served by the other Conference lines. (R. 26, footnote 7).

Insofar as they are active in the trade, *each Conference line operates as a common carrier by water.* Because the vessels of each member line of the Conference regularly call at United States ports for the discharge

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North Atlantic ports of the United States to Mediterranean ports, *via the Suez Canal* to Red Sea ports and ports in India and Pakistan, and then to the Far East including ports in the Philippines, Malay provinces, Japan and Formosa. The Conference vessels, after going to the Far East Westbound through the Panama Canal, most of them being members of the Far East Conference (F.M.B. Agreement No. 17), on that leg, return through the Panama Canal after loading cargo at the Philippines and sometimes at Hong Kong before taking on cargo at Japan for carriage to Pacific, Gulf and Atlantic ports in the United States.

and loading of cargo, the Conference lines are subject to the jurisdiction of the laws of the United States (R. 25).

The Conference and its member lines purport to act in concert and to operate pursuant to a conference agreement, F.M.B. No. 3103, first approved by a predecessor agency of the Federal Maritime Board in 1934 (R. 24, 39). The basic agreement permits the establishment and fixing of *uniform* rates as between conference lines, *but it has never contained language authorizing, or purporting to authorize, the use of any exclusive-patronage system* (R. 24). Notwithstanding this lack of approval by the Board the Conference employed the system illegally from 1928 (first on a few commodities only) until 1941 (when the Second World War forced the suspension of private shipping operations) and was thereby able, as the Board has found, to eliminate or suppress independent or non-conference competition (R. 25).[8] It should be noted that this Conference, organized in 1926, (R. p. 182, Ex. A),

[8] The Board's Report finds that "the pre-war differentials between contract and non-contract rates ranged from 12% to 66⅔% of the contract rates" (R. 25). The Conference and the Board have argued on various occasions that this period of illegal monopolistic activity was responsible for the "stability of rates." Such astonishing arguments have not been repeated in the present Briefs of Petitioners. Incredibly, however, the Conference was still gloating over its own illegalities as recently as its present Petition for certiorari filed with this Court, wherein it stated, that "Prior to World War II [the Conference] had employed a dual-rate system and thereby *brought about* stability of rates" (Conference Petition, page 4). Such a result we agree did take place by the elimination and suppression of all non-conference competition, so that every shipper was compelled to sign exclusive-patronage contracts in order to obtain the lower contract rates. The "non-contract rates" were, therefore, merely paper rates.

ten years after the Shipping Act, first employed a dual-rate system twelve years after that Act was passed.

Isbrandtsen's reasons for not wishing to join this or any other foreign-dominated steamship conference are compelling and important to it. The company has considered that it has the right to be free from such entangling alliances with other carriers—overwhelmingly foreign lines—which as a normal business practice should be its competitors. Neither the Board nor the Conference is willing to recognize this right of free enterprise, and they have implied that certain insidious motives are to be attributed to any carrier who would not succumb to the conference system.

A vital consideration influencing Isbrandtsen's determination to remain independent, and not to join any conference, has been the fact that practically all conferences are overwhelmingly dominated by foreign-flag lines, leaving the American lines in an ineffective minority in voting upon conference action on such important matters, for example, as the establishment or rates and regulations, the establishment and provisions of a dual-rate system and the opening of rates, or other action such as the institution of a rate war of the type which the Conference here involved began, with the result that American lines, with their high cost of operation, would suffer most, a result in this particular instance, so often elaborated upon by both the Board and this Conference in their Briefs.

The result of ineffective United States-flag influence under a conference agreement providing for a majority vote—the proportion ordinarily provided in such agreements—would similarly occur, in practically all

instances where a two-thirds vote was required, as well as in the case of this Japan-Atlantic and Gulf Freight Conference Agreement (F.M.B. No. 3103), said agreement being referred to in the Brief herein of the Conference, at page 4 and elsewhere. Under that Conference Agreement (R. 137), it is provided in paragraph 1(d) thereof that:

> "At meetings of the Conference for considering the scale of rates to be adopted or any revision of the scale in effect or for any other purpose (except as referred to in Par. 4) each of the parties hereto shall be represented by one representative, but in the event of a representative being unable to attend, such party may vote by proxy on notification thereof being lodged with the Secretary of the Conference and the decision of the Conference must be by a majority of not less than two-thirds of all the members of the Conference, it being agreed and understood that all decisions shall be effective and binding on all parties hereto."

This Conference has a total of seventeen (17) members of which twelve (12) are foreign lines, and five (5) are American lines. Under the provision quoted, therefore, two thirds of the total would be twelve (12), and a majority of that two-thirds would be seven (7), leaving, at all times, the five (5) American lines numerically ineffective. Moreover one of the American-flag Lines "is not entitled to vote" (R. 30, footnote 10).

Further reasons for Isbrandtsen's refusal to join the Conference and to relinquish its business independence to the concert composed of predominantly foreign-flag

carriers are readily apparent, even in the Board's Report. The Conference carriers themselves have not maintained the rates which they have purportedly agreed upon, and an American-flag carrier such as Isbrandtsen, who would choose to abide by any agreements it may enter, would in many instances be charging the highest rates in the trade. The evidences of this illegal rebating activity recently engaged in by the lines of this Conference, before they started a rate war to stop their own rate-cutting practices, are set forth in the Board's Report. For example, during October, 1952, the Conference discussed "strong rumors and indications that some member lines were not adhering to tariff rates and regulations" and formally brought the matter to the attention of the Japanese Ministry of Transportation (R. 28). The Ministry of Transportation issued a warning to each Conference line against these malpractices and the secret rebating by Conference members (R. 28).[9]

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[9] "The illegal rebating activities of this Conference have been traditional." In 1940, the United States Maritime Commission, the Board's predecessor, found that the members of the Japan-Atlantic and Gulf-Freight Conference (10 at that time, 9 foreign and 1 American) were "shown upon the record" to allow "persons to obtain transportation for property at less than the regular rates and charges currently established and enforced by means of *false billing*, in violation of section 16 "Second" of the Shipping Act, 1916, as amended; to give undue and unreasonable preference to particular persons and to subject particular persons to undue and unreasonable prejudice, in violation of section 16 "First" of that act, as amended; and to charge and collect rates and charges which are unjustly discriminatory between shippers, in violation of section 17 of that act, as amended." *Rates from Japan to the United States*, 2 U.S.M.C. 426; 437 (1940).

C. Proceedings Before the Board.

As previously stated, the facts for purposes of judicial review have been stipulated as those "existing in the administrative record as found by the Board itself" (R. 229-234). The Statements of the Case, appearing in the Board and Conference Briefs, however, especially the Brief of the Board, are so distorted, being not only outside the record but being also not within the proper scope of official or judicial notice, that Isbrandtsen feels compelled to present its own Statement in greater detail than it would normally desire.

1. *Procedural Steps Before the Board*

The present action stems from the filing by the Conference, on December 24, 1952, under Rule 236.3 of the Board's General Order 76 [46 C.F.R. 236.3], whereby the Conference proposed to employ, beginning on the 30th day following said filing, the exclusive-patronage system in the Conference trade (R. 153). Protests against the use of the system were timely filed by the United States Department of Justice and by Isbrandtsen, and said protests requested that a formal hearing be held before the issuance of any order that the system could go into effect (R. 20). By its Order of January 21, 1953, the Board refused to stay the institution of the system by the Conference pending a hearing and stated that it would grant only a post mortem hearing on the protests *after* the system would have gone into effect (R. 21; 214). Isbrandtsen filed a Petition to Review the Board's Order in the Court of Appeals for the District of Columbia Circuit, on January 22, 1953, and, on the same day, the Court granted

Isbrandtsen's accompanying application for a temporary stay of said Order (R. 21). Before the Court of Appeals, the Board argued that the agreement between conference carriers to use the monopolistic exclusive-patronage system was not an "agreement" under section 15 of the Shipping Act and could be employed by conferences without Board approval. The Court of Appeals quickly dismissed this fantastic argument, and, on March 23, 1953, it granted an interlocutory injunction against that part of the Board's Order which would have allowed the exclusive-patronage system to become effective *Isbrandtsen Company, Inc.* v. *United States*, 211 F. 2d 51 (1954). Petitions for Certiorari filed by the Conference and the Board were denied by this Court. *Japan Atlantic and Gulf Freight Conference, et al.* v. *United States*, 347 U. S. 990 (1954).

At lengthy hearings before the Board's Examiner, during the period between October 5 and December 23, 1953, the Departments of Justice and Agrienlture and Isbrandtsen appeared in opposition to the proposed system. The original Recommended Decision of the Examiner was dated September 13, 1954 (R. 22); this decision comprised less than 23 pages and contained not a single reference nor any ruling upon the 413 Proposed Findings of Fact or 43 Conclusions submitted by the Parties.[10] On the motions of Isbrandtsen, the Department of Justice, and the Board's own Public

[10] Neither the Board nor Conference Brief mentions the fact that there were two Examiner's Reports in this case, for they are both apparently quite anxious to forget this administrative interlude. The Board Brief merely states at pages 5 and 6 that, "Exceptions to the Examiner's *recommended decision* (sic.) and replies thereto were filed and oral argument was heard by the Board."

Counsel, the proceeding was remanded to the Examiner by the Board's Order dated October 6, 1954,

> "with instructions to prepare supplemental findings of fact as to the *basis for the spread* between contract and non-contract rates and as to the reasonableness of the exclusive patronage contract proposed for use in the trade, and with instructions to show the ruling upon the findings of fact and conclusions of law proposed by the parties." (R. 22).

In his Supplemental Findings, in response to the above directions of the Board, the Examiner categorically answered that,

> "*No basis for the spread or differential exists beyond the declarations of the Conference or its officers.*"

The Board itself, however, in *Contract Rates—North Atlantic Continental Freight Conference*, 4 F.M.B. 355, 371 (1954) had stated that:

> "Of course, the validity of the differential between contract and non contract rates cannot depend upon the mere declaration of its proponents. . . ." [11]

[11] This case is merely one in a long line of conflicting and inconsistent administrative decisions by the Board and its predecessors. The only consistency has been that since the case of *Rawleigh v. Stoompvaart*, 1 U.S.S.B. 285, in 1933, the maritime agencies have started with the preconceived notion that the system was legal *per se;* there has been no consistency, however, on the grounds for sustaining such legality, and principles announced in one case have seldom been followed in the next. No mention is made of the *North Atlantic* cases in the Conference brief, and the Board has only a passing and innocuous reference to it on page 73 of its Brief.

2. *The Board's Report*

Notwithstanding the deficiency of the administrative record (See Section 7 of Administrative Procedure Act, 5 U.S.C. 1009), the Board's Report, dated December 12, 1955 and served on December 14, 1955, purported to authorize the institution of an exclusive-patronage system by the Conference, effective as of January 1, 1956, whereunder the Conference would maintain two levels of rates, *viz.*, the "contract rates" and the higher "non-contract rates", the sole consideration for the enjoyment by a shipper of the lower contract rates being the agreement of the shipper to patronize the Conference lines exclusively, and to "boycott" all non-conference carriers, contract carriers as well as common carriers, as found by the Court below (R. 246, 247), the sole rea[illegible]ns for the exaction of the higher non-contract rates being the refusal of the non-contract shippers to sign such exclusive-patronage contracts with the Conference or its lines, or the action of a shipper in patronizing a non-conference line. The agreement with the shipper is signed by the Conference by its Secretary (R. 206). Irrespective of any formal deficiencies in the Board's Report, to sustain the system on its own announced theories, such Board approval of this, or any other, exclusive-patronage system was contrary to the specific provisions of Sections 14, 15, 16, and 17 of the *Shipping Act, 1916, as amended,* 46 U.S.C. §§ 812, 814, 815, 816 (hereinafter "the Shipping Act") prohibiting, among other things, "deferred rebates," "retaliatory," "discriminatory," "prejudicial," or "unfair practices," and other practices "detrimental to the Commerce of the United States."

In adopting the 9½ per cent differential between contract and non-contract rates, the Conference had no cargo statistics or surveys which it considered (R. 33). The non-contract rates were arbitrarily fixed at a level 9½ per cent higher than the contract rates (R. 20), although the Conference had not determined what rates it would establish under the exclusive-patronage system, and, therefore, the Board had no specific rates before it, in approving the system. Both the contract rates and the non-contract rates were to be charged *for precisely the same transportation service and all incidents of carriage, there being no difference in cost or value, or volume, or handling or in any other respect, between the service offered contract shippers and that offered non-contract shippers for identical cargo movements between the same ports and even on the same ship* (R. 35).[12]

In order further to coerce the shippers and to effectuate a complete and permanent monopoly in the trade, the exclusive-patronage contract, as "approved" by the Board, provided that in the event a contract shipper should patronize a non-conference vessel operating in the trade, the shipper would become liable to a penalty of 50 per cent of the freight which he would have paid at conference contract rates had the shipment moved on a Conference line (R. 36), which unconscionable fine he would be compelled to pay or lose his right

[12] The Board expressly found that:

"There would, under the dual rate system, be no difference in cost or value of service rendered to two shippers, one of which is a contract signatory and the other of which is not a contract signatory, although the cargoes of each might be identical and identically destined." (R. 35).

to the lower contract rates, and if he should violate his contract twice within one year, it would be cancelled, with the result he would have to pay the higher non-contract rates until he paid all his fines (R. 204).[13].

It should be noted that the 50 per cent penalty could not be based on any actual out-of-pocket loss to any Conference carrier. Furthermore, the Agreement between the Shipper and the Conference Carriers, strangely, provides that the penalty exacted will be paid "*to the carriers*" (R. 186), without specifying which particular Conference carrier might have been deprived of the shipper's patronage. There might not even have been any Conference line sailing on the particular day on which the shipper transported his cargo on an Independent line. If the penalty money is to be divided among *all* the Conference *lines*, part of it might be paid to several lines which would not, and could not, carry the particular cargo, because they either return from the Far East in ballast or do not serve the area or ports to which the shipper's cargo might be destined (R. 26). It is even more difficult to conceive, on what possible principle of recoupment of damages, the so-called "voluntary association", the Conference, could, itself, retain the penalty money. Such is another example of the many anomalies and legal deficiencies of this system.

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[13] It is important to note that whereas conference agreements authorized by Section 15 of the Shipping Act, 46 U.S.C. sec. 814, may contemplate elimination of competition *only among* member lines of the particular Conference, the principal purpose of the exclusive-patronage system is to eliminate and perpetually to suppress *non-conference or independent* carriers. This predatory purpose has been frankly admitted by representatives of the Board. See *infra*, page 78

The exclusive-patronage contract, moreover, would be entered into for an indefinite period of time—forever, except that it would be subject to cancellation upon *three months'* notice, a period sufficiently long to restrict the shipper's freedom of choice and possibly put him out of business. (R. 35). This entire system is intended to crush and eliminate the independent competition of Isbrandtsen, thereby allowing the Conference to enjoy a complete and perpetual monopoly in the trade and to charge such rates as the Conference lines may wish. The Board found (R. 30) that "Shippers testified to a lack of success . . . in their efforts to convince the Conference to reduce the level of rates on various commodities."

The economic coercion of the Conference is further aided by the fact that the Conference lines collectively furnish over 300 sailings a year as compared with only 26 sailings yearly (an approximately fortnightly service) by Isbrandtsen (R. 27). Many shippers in the trade require more than two sailings each month (R. 35). Various Conference lines also furnish certain special facilities, such as refrigerated space and silk rooms, which Isbrandtsen does not provide (R. 35).[14]

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[14] The exclusive-patronage contract obligates the shipper to ship, on Conference vessels "all shipments made directly or indirectly by him" (R. 203). The inference in the Board Brief, page 73, that, "commodities which are not carried by non-conference competitors cannot be included," is not correct. Even if no dual rates were established for refrigerated cargo, for example, the shipper would still be precluded by the present provisions of the exclusive-patronage contract from using a non-conference carrier for such cargo without incurring the penalties in the contract. In any event, the some 57 conferences which use the System and have no independent competition, must "include commodities which are not carried by

Furthermore, Isbrandtsen does not serve certain ports, such as Gulf and other ports, which the Conference lines serve (R. 35). Shippers who would have to rely on Conference vessels even for part of their service would be economically coerced into signing exclusive-patronage contracts with the Conference and would be prevented from patronizing or using the service of Isbrandtsen.[15]

The Brief of the Board implies at page 50 that the Conference would undertake an obligation to provide certain shipping space to contract shippers.[16] Any

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non-conference competitors," because there are no such competitors in existence.

[15] The Board in its Report admits the tremendous economic coercion which would be enjoyed by the Conference (R. 35):

> "Isbrandtsen's' carryings, if a dual rate system were put into effect in this trade, would be limited by the lack of reefer space and special silkrooms on Isbrandtsen vessels and by the limited frequency and range of service of those vessels. Shippers of dry cargo destined for Gulf ports, shippers of reefer cargo, and shippers requiring more than two sailings per month would practically, *have no choice* between the Conference and Isbrandtsen's service as presently constituted."

Such is the fertile field of monopolies generally.

[16] There is also an indication on page 50 of the Board Brief that the contract shipper can escape the penalties under the exclusive-patronage contract and ship via a non conference carrier if the Conference vessels should be unable to provide space for his cargo. Any such privilege in the contract is more apparent than real. It assumes that there will be a non-conference carrier able to carry his cargo which will not be the case if the system is effective, as witnessed by the some 57 Conferences using the system where there is *no* real independent operator. Under this particular exclusive-patronage contract, however, if the Conference carriers do not provide space, the shipper can secure space elsewhere *only after notifying* the Secretary of the Conference *and provided* that:

> "the Secretary does not notify him within three (3) days thereafter, excluding Sundays and holidays, of the availability of

such inference is false, as is apparent from the exclusive-patronage contract the shipper would be forced to sign (R. 203-206). The consideration is all on the side of the shipper. The Conference Brief, on page 3, frankly admits this illusory aspect of the exclusive-patronage contract stating that

> ". . . the Petitioners operate their vessels for their own account and profit; conduct their own business in such manner as their respective managerial judgments may determine; build such ships to be used in the trade as they may think appropriate; *have as many or as few sailings as they may deem best*; . . ."

The Board specifically found that most of the Conference vessels commence loading inbound cargo for the United States at the Philippines, proceed then to Hong Kong and complete loading in Japan, and that they discharge such cargo at Pacific, Gulf, and Atlantic ports of the United States (R. 25). The principal inbound cargo of Isbrandtsen has been loaded at Japan and the Philippines (R. 26). From 1950 to the present, Isbrandtsen has offered an approximately fortnightly service from Japan and the Philippines to Pacific and

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space on Carriers' vessels within the ensuing *fifteen* (15) *day* period."

Assuming a not unusual occurrence of an intervening Japanese or American holiday, the shipper might be required to wait nineteen (19) or twenty (20) days after notifying the Secretary, before he could obtain space on a Conference line. It is undisputed that many shippers in this trade need more than two sailings per month (R. 35). This 20 day delay would damage even a shipper who regularly requires only two sailings a month.

Atlantic Coast ports of the United States (R. 27). The Conference lines collectively during the year 1953 offered approximately 300 sailings from Japan and approximately 250 sailings from the Philippines, as against Isbrandtsen's 24 sailings in each instance. R. 27).[17]

The sailings and percentage carryings of the Conference vessels in the trade from Japan have increased substantially each year since 1950 without the use of the exclusive-patronage system. Both the Board and the Conference emphasize, in their Briefs, the relative participation between Conference vessels and the vessels of Isbrandtsen in the carriage of *Japanese* cargo, attempting to offer the implication that Isbrandtsen was carrying large percentages of this cargo movement in comparison with the Conference members (Bd. Br., p. 7; Conf. Br., p. 8).[18] The conclusion proffered by

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[17] The administrative record includes sailings for only the first half of 1953. Conference sailings for the full year 1953 are estimated on the basis of figures for the first six months of the year, during which the Conference had 153 sailings from Japan and 127 sailings from the Philippines, and Isbrandtsen had 12 in each instance.

[18] The Board, at page 7 of its Brief, states that the increased participation of Isbrandtsen in the carriage of cargo from Japan was "most probably at the expense of the non-Japanese Conference lines which did not enjoy as an offsetting factor the nationalistic preference of Japanese shippers (R. 61)." Just what the relevancy of this curious statement may be to the Board's argument is unknown to us, but in any event Isbrandtsen is a United States-flag carrier, which the Board has the primary duty to protect even under its regulatory statutes [See section 1 of the Merchant Marine Act, 1920, as amended, 46 U. S. C. 861]. There is no category of "non-Japanese Conference lines" set forth in any of the Shipping Acts as deserving of any similar protection by the Board.

the Board and the Conference is most patently illusory. The trade from the Philippines and Japan to the Gulf and the Atlantic Coast of the United States is actually one trade participated in by all carriers, as the Board's Report finds (R. 25, 26). All of the members of the Japan-Atlantic and Gulf Freight Conference [except States Marine which returns inbound in ballast (R. 26)] belong to the Associated Steamship Lines (Manila Conference), which covers the trade from the Philippines to the United States and *other ports of the World.*[19] Isbrandtsen has been virtually excluded from Philippine cargo by use of the exclusive-patronage system in that trade.

When the overall trade from the Philippines, Hong Kong and Japan is considered, *the Conference lines have carried, on the average, on each sailing, more cargo than Isbrandtsen.* For example, taking the last full year of record, 1952—long before the Conference started the Rate War—each Conference vessel carried an aver-

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[19] The Associated Steamship Lines (Manila Conference) is one of the most all inclusive and far-reaching conferences in existence, having 45 foreign-flag line members and 7 American-flag line members. This conference includes under its jurisdiction many trades not even involving the foreign commerce of the United States, yet conducted under a Conference Agreement [F.M.B. No. 5609], approved by the United States Maritime Authorities. The extraordinary scope of its coverage is described, in *Approved Steamship Conference and Related Agreements* (Federal Maritime Board, April 15, 1956), p. 53, as follows:

> "Covers freight traffic from the Philippine Islands direct to, or via ports in Ceylon, India, Pakistan, Malaya, East Indies, Indo-China, Burma, Siam, Hong Kong, China, Korea, Japan, Siberia, United States of America, Canada, Cuba, Mexico, Central America, Canal Zone, South America, Caribbean Sea Ports, West Indies, Australia and New Zealand."

age of 4700 tons per sailing from the Phillipines as against only 1007 tons carried by Isbrandtsen (R. 27), so that on arrival at the United States, every Conference vessel had, on the average, more cargo aboard than did Isbrandtsen's ships. In addition, the Conference vessels loaded cargo at Hong Kong, from which port Isbrandtsen carried no cargo (R. 27).[29] Thus the Conference vessels loaded substantial inbound cargoes, before ever calling at Japan, in trades where Isbrandtsen is virtually excluded from participation because of the use of the exclusive-patronage system. These figures show conclusively that there has been no gradual encroachment by Isbrandtsen upon the carryings of the Conference—*the situation has been, in fact, the reverse.*

The Conference argues, in footnote 4 on page 8 of its Brief, that it is "inappropriate" to combine the carryings from the Philippines and Japan in measuring the relative participation of the Conference lines and Isbrandtsen. In this respect, the Conference argues that Japanese cargoes pay a higher revenue than Philippine cargoes and are more highly coveted by the Conference. The argument is misleading. The record contains no proof of the profits or loss incurred by either Isbrandtsen or the Conference lines. There are many

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[29] Isbrandtsen has also been excluded from participation in the trade from Hong Kong to the Atlantic Coast of the United States because of the employment of the exclusive-patronage system in that trade by the New York Freight Bureau (Hong Kong) [F.M.B. Agreement No. 5700]. All of the members of the Japan-Atlantic and Gulf Freight Conference, which serve the trade from Hong Kong, also belong to that other conference, the New York Freight Bureau (Hong Kong).

instances where lower-rated bulk cargoes may afford a higher return to the carrier than higher-paying general cargo, when handling costs, port delays and other factors are considered. Also, there is no indication in the record as to whether Isbrandtsen may have carried lower-revenue cargo from Japan than have the Conference lines. The fact that is clear in the record is that Isbrandtsen would have desired to carry larger amounts of cargo from the Philippines but was precluded from doing so because of the use of the exclusive-patronage system in that trade.[21]

The Conference also argues, on page 8 of its Brief, without any reason, that this particular trade must be treated in isolation, and that it is "irrelevant" that Isbrandtsen has been excluded from other trades. Such an argument loses any sense of reality. In this connection also, the Board in its Brief repeats the meaningless finding in the Board's Report that Isbrandtsen would retain 10 per cent of the cargo in the Japan-Atlantic trade if the system should be instituted (Bd. Br., pp. 9, 31, 32). Of course, the Board could not by any such *ex cathedra* pronouncement guarantee any specific participation to Isbrandtsen, and it is contrary

[21] Many factors can account for one line's carrying a higher percentage of cargo from a particular area than another line. Some lines, for example, do not offer as extensive port coverage as other lines. In this particular trade, because of the relative scarcity of inbound cargoes, as the Board's Brief admits on page 29, some lines return to the United States in ballast. Isbrandtsen has been forced to concentrate on Japanese cargo and to offer an extensive port coverage in Japan because of its exclusion from the other inbound trades. Furthermore, the Conference lines outbound from the United States carry large volumes of profitable cargo, which accounts for the overtonnaging on the return.

to any logical analysis that such a fantasy should be presented by any agency supposedly harboring "expertise". In this respect, it may be asked: Why has Isbrandtsen failed to carry its proportionate amount of the cargo in the Philippine and Hong Kong trades where the exclusive-patronage system is now in use? The answer quite obviously is that, once shippers have been tied up under the exclusive-patronage contracts, e.g. no such theoretical prognostication of independent carrier participation can become a reality. See the discussion *infra* concernings the statements of the Chairman of the Board in the *Trans-Pacific Freight Conference of Japan*, 4 F.M.B.—(1955).

This particular Conference trade, between Japan, etc. and the Gulf and Atlantic ports, if it is to be examined at all, cannot be considered in isolation. Neither the Conference carriers nor Isbrandtsen could conceivably stay in business by carrying return Japanese cargoes alone. In the carriage of cargoes between the Far East and the United States, numerous conferences will assert jurisdiction over the cargo movements involved, all of which cargo may move on the same vessel.

For example, Kawasaki Kisen Kaisha, Ltd., a member of the Japan-Atlantic and Gulf Freight Conference, operating between the Far East and the United States, belongs to eighteen (18) steamship conferences, twelve (12) of which presently employ the exclusive-patronage system.[22] The situation of that particular Conference line is somewhat typical. If the trade is

[22] These statistics are on public file with the Board, and some are published in *Approved Steamship Conferences and Related Agreements* (F.M.B., April 15, 1956).

to be examined at all, therefore, and Isbrandtsen contends that the fundamental issue before this Court relates to a question of law, the complete facts should be viewed, not only those which the Board and Conference consider favorable.

The trade *from* Japan to the North Atlantic is presently overtonnaged, as both the Board and Conference admit (R. 27). This overtonnaging problem was made serious by the re-entry of Japanese lines into the trade, which lines carried only 15 per cent of the total cargo movement in 1951, but 66 per cent of such total movement in the first six months of 1953 (R. 28).[23] United States-flag participation, including that of Isbrandtsen, fell from 53 per cent in 1950 to only 21 per cent in the first six months of 1953 (R. 28). Instead of applauding the independent efforts of Isbrandtsen to maintain United States-flag participation in the trade, the Board seems quite insistent in snuffing out this one last vestige of American-flag independence.

As previously stated, the Conference lines have traditionally engaged in malpractices and secret rebating, and have failed to observe their own tariff rates (See footnote 9, *supra*). Such secret rebating and illegal rate cutting activities, during the pre-war years, took place when the Conference admittedly enjoyed an absolute monopoly through its illegal use of the exclusive-patronage system—due to lack of approval—and was thereby able to destroy all independent competition (R. 25). The ills which befall cargo operations in this trade are, therefore, chronic and will not be solved by

[23] The Board found that there "is a tendency on the part of Japanese shippers to favor Japanese lines. . . ." (R. 29).

the use of the predatory exclusive-patronage system, since that system will only provide for the destruction of the independent operator; it cannot cure the malpractices of Conference operators themselves, which practices are difficult if not impossible for the Board to police.

In March 1953, the Conference rejected a proposal of a member line to meet Isbrandtsen's competition by lowering the Conference tariff rates (R. 30). The Conference instead voted on March 12, 1953 (after the Court of Appeals had granted the stay referred to above, against the use of the system) to "open" rates on the ten major commodities in the trade (R. 30). Subsequently, the Conference opened rates on most commodities which move in substantial volume (R. 30). The Board found that the decision to start the rate war was directed at non-conference competition and also *at the secret "rebating" by Conference lines* (R. 31). It is frankly stated by the Board that the Conference, in starting the rate war,

> "hoped that the rate war would lead to Isbrandtsen's joining the conference or to the institution of the dual rate system or other system" (R. 31) [either of which occurrences would have given the Conference an absolute monopoly].

On page 7 of the Board's Brief, the facts concerning the Conference institution of the rate war are deliberately misstated. It is stated that the Conference opened rates on ten major commodities, on March 12, 1953, "in order to meet Isbrandtsen's competition." Even the Board's own Report had found that it was

also directed at the secret "rebating" by *Conference lines* (R. 31). It seems quite clear that Isbrandtsen was merely the scapegoat in this brazen action of the Conference.

The Board's Brief, on page 72, where it attempts to marshal the so-called "principles" which the Board's own cases have allegedly established, with respect to the exclusive-patronage system, states that

> "the dual rate system will not be approved unless there is a showing that its use will not result in a virtual monopoly by the Conference lines, *nor if the Board concludes that the dual rate system will not in itself eliminate the rate instability due basically to over-tonnaging and malpractices such as secret rebates by member lines.*"

As authority for this most recent attempt at palliation, the Board's Brief cites *Trans-Pacific Freight Conference of Japan*, 4 F. M. B. — (1955). The Trans-Pacific Freight Conference of Japan [F. M. B. Agreement No. 150], is nothing more than the companion conference of the Japan-Atlantic and Gulf Freight Conference. The Board's Report admits that the two conferences "have taken *identical actions* at similar times, that the conferences meet at the *same address*, and that the membership for the greater part is *common*." Fifteen of the seventeen members of the Japan-Atlantic and Gulf Freight Conference (all except Waterman Steamship Corporation and Lykes Bros. Steamship Corporation, two United States-flag carriers) also belong to the Trans-Pacific Freight Conference of Japan. The two conferences have traditionally

acted together on rate matters and prior to the Second World War at least published a joint tariff. *Rates from Japan to the United States, supra.* It is extraordinary, therefore, under these circumstances that the Board should cite the *Trans-Pacific* case for the above-announced proposition. The "secret rebating" referred to in that case involved secret rebating by the same lines referred to in the instant case. The Japanese Ministry of Transportation issued joint warnings to the members of each conference concerning these illegal activities. Moreover, the decision of the Japan-Atlantic and Gulf Freight Conference to start the rate war on March 12, 1953 was taken "in view of the action taken previously [by virtually the same lines] by the Trans-Pacific Freight Conference of Japan" (R. 31).

Immediately after the outbreak of the rate war, rates fell to less than out-of-pocket handling costs (R. 31). In May 1953, Isbrandtsen instituted minimum compensatory rates below which it would not go to secure cargo (R. 31). *Isbrandtsen gave public notice in the trade of its desire to apply reasonable rates, which practice the Conference lines refused to adopt.*

3. *The Board's Inaction during the Rate War*

The Board in its Report has found that the rate war, instituted by the Conference, has been severely detrimental to the Commerce of the United States, and that it had resulted in United States-flag lines, including Isbrandtsen, carrying little or no cargo in the trade—at least up to the time of the hearing (R. 32). Many shippers requested the Conference to end its deleterious practice (R. 32). So did Isbrandtsen!

The Board's Brief intimates in various instances that the Board has plenary power over the rate practices of Conference lines, although not over those of the independent (Bd. Br. pp. 31, 32). Certainly, the Board's own inaction for over four years, while the Conference carried on its pernicious rate war, negates any claim at this time by the Board that it will hereafter protect the public interest. The rate-war conditions were called to the Board's attention formally on several occasions and were commented upon publicly by the Board Members, and repeatedly in the press of this country and Japan. Despite the deleterious results which followed from the Conference's display of power, in defiance to the Court of Appeals below, for granting, on January 23, 1953, an injunction against the use of the system, the Board has not lifted one finger to halt this Rate War, from March 12, 1953, to the present. The Board, in its Report, admits that it had, at all times, the power, and, indeed, the statutory sanction to end the rate war by methods short of establishing and promoting a monopoly of foreign-flag carrier, for it states that:

> "In any event this Board has full power over those rates of conference carriers in foreign commerce which are detrimental to the commerce of the United States" (R. 65).

The opinion of the Court in *California* v. *United States*, 320 U.S. 577 (1944), by Mr. Justice Frankfurter, concurs in this analysis by the Board of its own powers, as follows:

> "Finding a wrong which it is duty-bound to remedy, the Maritime Commission, as the expert body

> established by Congress for safeguarding this specialized aspect of the national interest, may, within the general framework of the Shipping Act, fashion the tools for so doing. Cf. *United States Nav. Co.* v. *Cunard S. S. Co.* 284 U.S. 474" and other cases. [320 U.S. 577 at 584]

Various opinions of the Board's predecessor agencies have recognized these inherent powers of the Maritime Agency administering the Shipping Act to condemn rate practices of conference lines which are found to be detrimental to the commerce of the United States. *Edmond Weil* v. *Italian Line*, 1 U.S.M.C. 395 (1935); *Pacific Coast-River Plate Brazil Rates*, 2 U.S.M.C. 28 (1939); *Pacific Forest Industries* v. *Blue Star Lines, Ltd.*, 2 U.S.M.C. 54 (1939); *Cargo to Adriatic, Black Sea, and Levant Ports*, 2 U.S.M.C. 342 (1940).

4. "*Public Interest.*"

The Brief of the Board injects into this proceeding an unfounded argument concerning "public interest." We ask at the outset, what "public interest" are they talking about—that of this Country or of other countries? In this connection, the Board's Brief refers to "general support" given to the system by shippers (Bd. Br., p. 8), and it also refers to an alleged but fanciful protection which would be given to American-flag carriers by use of the system (Bd. Br., p. 30).[24] Such arguments have little foundation in fact, let alone any persuasive force on the legal issue of the lawful-

[24] The Brief of the Conference contains similar arguments (Conf. Br. p. 11).

ness of the System. Whether shippers join the system, or oppose it, can in the last analysis have no weight in the consideration of the issue of legality here posed. In any event, however, neither the Board nor the Conference has established any right to speak for the shipping public in this respect.[25]

The Board has been traditionally interested in espousing the interests of the steamship conferences. Even the Board's Report, however, was forced to recognize

[25] The Board has consistently given short shrift to the other side of the picture, namely, any objections of shippers opposing the use of the system. It has paid little attention to the opposition of the Secretary of Agriculture of the United States, the largest shipper in the World, who has consistently opposed the exclusive-patronage system, and who is a Respondent in this very case. The various farm organizations of the United States, representing hundreds of thousands of American shippers, the American Farm Bureau Federation, the National Council of Farm Cooperatives, the National Grange, the Farmers' Union, and the United Fresh Fruit and Vegetable Association, have opposed the system and testified against it before the Board, yet their testimony was scarcely mentioned in the Board's Report. *Secretary of Agriculture* v. *N. Atlantic Continental Freight Conf.*, 4 F.M.B. — (1956). The latter case is now pending appeal from the Board's decision, approving the use of the system in that trade upon the Petition to Review filed by the Secretary of Agriculture with the Court of Appeals for the District of Columbia Circuit. As far as shipper opposition is concerned, the Board's Brief (p. 73) correctly states the fact that, "The *support* of shippers interested in the trade has been given weight." It cites for this proposition the North Atlantic Conference case; it should have added that, "the opposition of shippers interested in the trade *has been given no weight.*"

Certainly also, the Board does not speak for the many shippers who have been coerced into signing exclusive-patronage contracts against their wills, nor those American shippers who have been sued by the conferences in an effort to recover the unconscionable penalties imposed by such contracts. See *Pacific Westbound Conference* v. *Leval*, 269 F. 2d 541 (1954); *River Plate and Brazil Conferences* v. *Pressed Steel Car Company*, 222 F. 2d 369 (1955).

that the shipper witnesses, appearing at the administrative proceeding, gave no unqualified endorsement to the exclusive-patronage system (R. 33, 34). At least one shipper witness—appearing on behalf of the Conference—expressed his dissatisfaction with the differential between contract and non-contract rates (R. 33). The Board also reported (R. 34) that

> "Another shipper withdrew his opposition contingent upon the premise of better future cooperation by the conference in negotiating freight rates with shippers and in discussing terms and conditions of the dual rate contracts."

Furthermore, neither the Board nor the Conference mentions that the only shipper witnesses to appear at the hearing were those of the Conference, mostly Japanese shippers (R. 32), imported from Japan by the Conference to testify at the proceeding.[26]

The Board and the Conference attempt to hinge a considerable part of their factual argument on the fact that Isbrandtsen had, prior to the Conference rate war,

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[26] The lack of shipper testimony in opposition to the powerful Conference Monopoly is not surprising. Few shippers can enjoy the freedom of the Secretary of Agriculture or the farm organizations. In the most recent book on the Conference Monopolies, *International Shipping Cartels*, (1953) by Daniel Marx, Jr., who himself has appeared as a paid witness of the conference in support of the system [See *Trans-Pacific Freight Conference of Japan*, 4 F.M.B. — (1955)], reference is made at page 51 that the Alexander Committee (Vol. 4, pp. 5, 59) had noted that very few shippers were willing to testify, fearing retaliation, and that the Report of the English "Royal Commission on Shipping Rings" had previously found the same situation to exist, *viz.*, that shippers, in fear of reprisals, were afraid and unwilling to testify—that is, against the conferences.

charged rates below those appearing in the Conference tariff. There was every justification for Isbrandtsen's rate practices. First, there has never been any question but that Isbrandtsen always charged compensatory rates; secondly, various Conference carriers themselves were charging rates below those appearing in the Conference tariff through the device of secret rebating; and, thirdly, even the Conference's own shipper witnesses complained that prior to the rate war the Conference rates were too high. On the latter point, the Board found that:

> "Various shippers have considered the general level of conference rates to have been too high, prior to March 12, 1953" (R. 30).

The Board found further on the same page that:

> "Additionally, shippers testified to a lack of success until subsequent to March, 1953, in their efforts to convince the conference to reduce the level of rates on various commodities" (R. 30).

Under these circumstances, it certainly was most proper, and indeed necessary—because the Conference lines were rate-cutting among themselves—for Isbrandtsen to charge rates below those appearing in the Conference tariff. Neither the Board nor the Conference are so brazen as to assert that Isbrandtsen, as an independent carrier, should have been bound by the Conference tariff. Strangely enough, the Board finds at the end of its Report that

> ". . . the continued existence of Isbrandtsen as an effective competitor and the existence of strong

shipper groups insures conference consideration of shipper needs and desires" (R. 68).

This assumes that, if Isbrandtsen could continue, it would have to charge rates *at a lower level* than the rates of the Conference.

It should be noted here that the Board's Report itself assumes that the independent carrier, confronted with competing against a Conference using the exclusive-patronage system, *would necessarily have to charge rates below the Conference tariff in order to get any cargo.* The Board, in this respect, recognizes in its Report that Isbrandtsen would have to give rate "inducements" in order to get any share of the cargo from the Conference (R. 62). The Board's Report also alludes to certain mythical shippers who *might not* sign an exclusive-patronage contract, and, thereafter, ship one-half of their shipments by Conference carriers at the non-contract rates and one half at the *lower* rates of an independent (R. 33). Such an argument is not only specious, but obnoxious to all American statutes designed to preserve free business enterprise and to prevent monopolistic coercion. On what theory can the Board pass on to the Conference the power to force the non-conference carrier into the impossible situation of being able to exist only if his rates are always maintained at levels at least 9½ per cent below the Conference contract rates?

The Board's argument is fraught with so many inconsistencies and illogical absurdities that it is impossible to discuss them all. Not the least of such absurdities, however, is the fact that the Board would approve,

and apparently consider, as reasonable, the Conference non-contract rates, which are 9½ per cent *higher* than the Conference contract rates, and, at the same time, consider that a level of rates 9½ per cent *below* these Conference rates would be reasonable for the independent carrier. As a matter of mathematics, *the Conference non-contract rates would always be twenty-one (21) per cent higher than the rates which the independent would have to charge on the Board's theory.* For example, if the Conference contract rate on a particular commodity were $80 per ton, the Conference non-contract rates, being 9½ per cent higher, would be $87.60 per ton. The independent, in order to meet the Conference differential between contract and non-contract rates, according to the theory of the Board, would have to charge a rate of $72.40 per ton. The difference between the Conference non-contract rate and the rate of the independent would be $15.20, or the Conference non-contract rate, therefore, would be twenty-one (21) per cent higher than the rate of the independent.

Even in theory, the Board's formulation of the effect which the exclusive-patronage system would have on the independent cannot be defended. In this respect, the Board's Report recognizes that no one could identify any hypothetical shippers who would, or could, split their shipments 50-50 between the independent carrier and the Conference lines and still come out even in total freight payments (R. 33),[27] all of this assuming,

[27] The matter of splitting shipments in this way, of course, would not be as simple as the Board assumes. Shippers in this trade, as in others, will ordinarily ship many different commodities taking

of course, that the Independent carrier would and could charge rates always at least 9½ per cent below the Conference contract rates. As a practical matter, *it is probable that all shippers would be forced to sign up,* and as a practical matter also, Isbrandtsen could probably not afford to charge rates 9½ per cent *below* the Conference contracts rates on *all* commodities. Isbrandtsen's rates are fixed in order to be compensatory, and, at least during the period since March 12, 1953, it has charged rates higher than those of the Conference lines (R. 31). When the Conference ties the shipper to the exclusive-patronage contract, it is not in relation even to the existence of an independent carrier, much less is it premised on any foundation in fact that an existing non-Conference carrier does charge rates lower than the Conference rates. The prime objective of the Conference's system is to tie up all shippers, even though independents might charge rates *higher* than Conference rates.

If the Board undertook a realistic application of some of the "principles" it has announced in its own decisions, *but has never applied,* it would have long since prohibited all conferences from using the system. For example, in *Contract Rates—North Atlantic Freight Continental Freight Conf.*, 4 F.M.B. 355 (1954), *a case now ignored by the Board and Conference,* the Board stated that:

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different ocean transportation rates, which rates may change during the course of a year. The shipper will, moreover, not know the exact quantities that he will ship during the course of a year and will have no way of planning such split shipments even if such an unrealistic practice were otherwise assumed to be practicable."

> "The inducement to a shipper becomes coercive upon him if it unduly forces his original choice, or places unreasonable restrictions upon his subsequent freedom to choose any carrier that he may later prefer."

Should we consider the Board's assumption in its Report in the instant case to be true, which certainly has not been proven, that Isbrandtsen could exist in the trade after the sytem were instituted, by charging rates 9½ per cent. below the Conference contract rates, all that the Conference would have to do to drive Isbrandtsen out of business once and for all would be to lower its contract rates temporarily to a level which Isbrandtsen, as a United States-flag carrier, could not underquote, and, of course, when Isbrandtsen disappeared, the Conference would be free, as any monopoly would, to raise its rates without limit—to charge "what the traffic would bear", as Conference witnesses have usually put it. Certainly the Board, which has never exerted any real control or supervision over the *level* of Conference rates, could not be relied upon to stop such a result, and, in any event, the subtleties involved in such a Conference freeze-out program would make it virtually impossible to police. The Board, of course, has done nothing to control Conference rate practices during the four-year period of the Rate War, and they have failed to disapprove, in their Report, or otherwise, even the prima facie exorbitant rates that the Conference would charge to *non-contract shippers*.[28]

[28] It is no answer to the Board's inaction during the rate-war period that the Conference had "opened" rates and were no longer

Connected to this over-all problem is the fact that this exclusive-patronage system would cover *all* commodities. Many large shippers ship a great number of different commodities. If the shipper, signing an exclusive-patronage contract, should thereafter become dissatisfied with an unreasonably high Conference rate increase on one commodity, for example, it would *not* be possible for him to use an independent, to carry that commodity, *even if such a carrier were available*, because such action would require the shipper to cancel or violate his contract for *all* other commodities, for which he might not be able to get sufficient service from the independent carrier. He could not, therefore, readily take advantage of any lower rate which the independent might offer on that particular commodity, without thereby becoming subject to the higher-penalty non-contract rate for the carriage of *all* of his commodities on the Conference lines, or without incurring the unconscionable penalties provided for in the exclusive-patronage contract. This is the coercion which, after forcing him to sign the exclusive contract, keeps him bound to it, in perpetuity. It should be borne in mind also, that the shipper is required to give three months' notice of cancellation. The tremendous economic coer-

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acting as a Conference with respect to such rates. Conference action *was taken* in the opening of the rates, and the Conference *did continue to operate as a Conference*, under its basic agreement, approved by the Board, *during the entire period of the Rate War*. If Board jurisdiction could be avoided merely by the device of opening rates, then the professed power of the Board to stop Conference rate practices detrimental to the commerce of the United States would be meaningless. All that a Conference would have to do to escape the Board's power would be to open rates and thereafter act with impunity, as well as with immunity.

cion against the shipper is, therefore, insidious and complete. The Board's observation that, "the *continued existence of Isbrandtsen* as an effective competitor . . . insures conference consideration of shipper needs and desires" is an assumption taken out of thin air. Neither Isbrandtsen, nor any other independent carrier, could continue as an "effective competitor" in the trade when confronted with the tremendous coercive effect of the exclusive-patronage system, which has so many powerful and sometimes subtle aspects of coercion.

It would hardly appear to be consonant with the interests of the shipping public to promote a complete monopoly for the fixing of steamship rates. The Board's Brief, however, under the heading "The Insistent Economics of Ocean Shipping", *a section filled with allegedly general but unfounded concoctions*, advances the astonishing argument that the effectuation of the Conference Monopolies, by use of the exclusive-patronage system, is necessary to protect the higher-cost United States-flag operator (Bd. Br., pp. 28-29). (Isbrandtsen, it must be pointed out, is such a "higher-cost" United States-flag operator.) *The Board, in other words, proceeds upon the assumption that Conferences fix rates so as to allow a profit to the highest-cost operator in the trade.* It should be noted that the facts alleged in these arguments by Board's Counsel were not presented at the administrative hearing, and that the alleged facts involved are not so free from contention as to be within the scope of official or judicial notice. More importantly, however, the arguments are logically as well as legally absurd on their face.

The Federal Maritime Board is empowered and indeed directed to grant construction and operating-differential subsidies to United States-flag carriers under Titles V and VI of the Merchant Marine Act, 1936, as amended, 46 U.S.C. sec. 1151, *et seq.* The purpose of these subsidies is to place the United States-flag carrier *on a parity* with respect to operating and construction costs with his foreign-flag competitors. No similar policy of subsidy is announced in the Shipping Act of 1916, which is primarily a regulatory act, similar to the Interstate Commerce Act, 49 U.S.C. sec. 1, *et seq.* If the subsidy program places the United States-flag carrier in a position of parity with respect to foreign costs, why should the American shipping public—importer, exporter and consumer—be required to pay a further subsidy, by way of rates fixed by foreign-dominated conferences, to allow a profit to the high-cost American-flag carrier on top of the subsidy? The suggestion is preposterous—the only real beneficiaries of such an astounding program would be the much lower-cost, foreign-flag carriers, which thereby would receive windfall profits, and American exporters, importers and consumers would be the involuntary donors. The exporter, importer or consumer in Iowa, for example, who never saw an ocean, let alone a big ship, would be assessed not only for the subsidies paid out of the United States Treasury, but also for the bonuses to the low-cost foreign operators. Considering the overwhelming membership of the foreign-flag lines in these conferences, it becomes readily apparent that, when rates are fixed sufficiently high to allow the higher-cost United States-flag carrier a profit above subsidy, the lower-cost

foreign-flag lines are benefiting in some cases by a ratio of 23 to 1. In other words to protect one American-flag line, American exporters, importers, and consumers must pay exorbitant and unreasonable rates to all of the foreign-flag lines.

The position of foreign-flag carriers in such monopolistic conference arrangements is obvious. Their interests, of course, are quite real and selfish, but they do not constitute the "public interests" of *this country*. There are some 125 Steamship Freight Conferences on file with the Board, organized pursuant to agreements under section 15 of the Shipping Act. See *Approved Steamship Conference and Related Agreements* (F.M.B., April 15, 1956). As previously stated, and as admitted in the Board's Brief (Bd. Br., p. 18), 62 of these conferences presently employ the exclusive-patronage system. Only 7 of these conferences, now using the system, however, have any independent competition whatsoever, as admitted in the Affidavit of Lloyd Tibbott, Chief of the Board's Office of Regulation, filed with the Court below (R. 133-136). Even the non-conference competition which is alleged to exist is exceeding minimal, amounting for the most part to the independent competition of Isbrandtsen—the single non-conference line in 3 of those 6 trades—and Isbrandtsen's operations in those trades is virtually non-existent.

For example, Isbrandtsen is listed as the only independent competitor in the "Atlantic-Far East" trade (R. 136) in competition with the Far East Conference (F.M.B. Agreement No. 17), but in that trade Isbrandtsen operates to the Far East via the Suez Canal, on its

Eastbound Round-the-World Service, and is not competitive ordinarily with the vessels of the Conference which take the substantially shorter and more direct route via the Panama Canal. Isbrandtsen, as a consequence, has carried very little cargo in this trade. Similarly, in the trade of the Pacific Coast European Conference (F.M.B. Agreement No. 5200), where Isbrandtsen is listed (R. 136) as the sole independent competitor, the Board found in *Agreement and Practices Pertaining to Brokerage Pacific Coast European Conference*, (decided March 29, 1957) (Mimeographed Opinion, page 10), that Isbrandtsen's "competition is relatively minor." Again, in another one of these conferences where Isbrandtsen is listed as the sole independent line, (R. 135), the "Atlantic-Malay States" trade (F.M.B. Agreement No. 8240), virtually the entire cargo movement and the vessels of the Conference proceed outbound through the Panama Canal; Isbrandtsen could carry very little cargo outbound over the much longer route through the Suez Canal.

In the remaining three conference trades listed (R. 135-136) as "having independent competition", the "Gulf & South Atlantic Continental Europe" trade (F. M.B. Agreement No. 134) shows three foreign lines as independent competitors of the Conference (R. 135). The "North Atlantic-Mediterranean" trade (F.M.B. Agreement No. 7980) lists Isbrandtsen and four foreign lines as independent competitors (R. 135), and the "Atlantic & Gulf/West Coast of South America" trade (F.M.B. Agreement No. 2744) lists only one independent, a foreign line (R. 136).

It should be noted that the largest American-flag

member of the Japan-Atlantic Conference (not carrying the largest amount of cargo in this particular trade, however), the heavily subsidized American President Lines, whose chief Counsel appears as "Special Counsel" on the Board's Brief, and who will argue the case for the Board before this Court, belongs to a total of 43 conferences, of which only sixteen (16) conferences use the exclusive-patronage system. Of those sixteen (16) conferences, however, which use the system, only two (2) have any independent competition (F.M.B. Agreement No. 8240, from the Atlantic to the Malay States, and FMB Agreement No. 17, from the Atlantic and Gulf to the Far East). In neither of those conference trades, which proceed through the Panama Canal, is Isbrandtsen, which is the alleged competitor (R. 135-136) really in competition with American President Lines, because Isbrandtsen takes the longer route through the Suez Canal.

So where is the independent competition, presently existing, to justify one of the "standards"—*viz.*, "independent competition"—fabricated by the Board as a justification for the use of the system (Bd. Br., p. 72)? Where there is no independent competition, of course there could be no "instability of rates" or "instability of service" caused by a non-conference line.

Even under the Board's own criteria, nothing is left as a justification for the use of the system. The system is completely antagonistic to American political and economic philosophy and is not indigenous to this country, being merely a reversion to the "old-world" cartel idea of letting any and all conferences use the system solely as a "weapon" against or a "deterrent"

to any independent daring to intrude into the trade *in the future*—a situation which the Board and Conferences have dubbed "potential competition".

In a recent oral argument before the Board, on September 17, 1957, in *Statement of the Great Lakes—Bordeaux/Hamburg Range Westbound Conference* (Docket 795), the Board's Public Counsel, Mr. Schmeltzer, stated correctly, in response to a question from the Board's Chairman, as follows:

> "But you cannot get around the law and say that at some time or other there may be instability in the trade and there may be overtonnaging; so you will have a dual-rate system in every trade which applies for it. So that if ever independent ships come in and are strong, they can be forced out." [Transcript, p. 47]

And in this connection, the following are pertinent and supporting statistics, gathered from the Board's official publication *Approved Steamship Conference and Related Agreements* (F.M.B., April 15, 1956) and from other public records at the Board:

Of the one hundred and twenty five (125) conferences on file with the Board, there are three hundred and five (305) foreign flag members and only forty-one (41) American-flag-line members.

In at least twelve of the sixty-two (62) conferences using the exclusive-patronage system there is only one (1) American line. These conferences, showing the foreign-flag and United States-flag membership, are as follows:

Conference Name	F. M. B. Agreement No.	Foreign-Flag Members	U. S.-Flag Members
North Atlantic Westbound Freight Association	5850	9	1
North Atlantic United Kingdom Freight Conference	7100	11	1
North Atlantic French Atlantic Freight Conference	7770	3	1
U. S. Atlantic & Gulf/Australia New Zealand Conference	6200	3	1
Pacific Coast Australasian Tariff Bureau	50-1	4	1
Pacific/West Coast of South America Conference	4630	9	1
Capea Freight Conference	7170	7	1
Gamexico Freight Conference	6670	14	1
Pacific Coast River Plate Brazil Conference	6400	6	1
Pacific Coast/Mexico Freight Conference	7570	7	1
Pacific Coast European Conference	5200	23	1
Association of West Coast Steamship Companies	3302	16	1

In the above conferences, all using the system illegally *without Board approval*, foreign-flag lines dominate by a total of 112 to 12. In only two of the trades, moreover, the North Atlantic-United Kingdom and Pacific Coast European (R. 135, 136) is there even any claim of independent competition, and in at least one of these trades the independent competition has since disappeared.[29]

In various of the Conferences *using the system*, the proportion of Foreign-flag lines to American-flag lines runs, for example:

23 to 1
16 to 1
14 to 1

[29] Mitsui Steamship Co., Ltd., a Petitioner herein, was listed in Mr. Tibbott's affidavit as an independent operator in each trade, but has now joined at least the Pacific Coast European Conference, in which its membership was accepted conditionally upon its withdrawal of a complaint which it had filed with the Federal Maritime Board.

11 to 1
9 to 1
7 to 1
15 to 2
14 to 2
13 to 2
12 to 2
9 to 2
18 to 3
20 to 4
45 to 7

So the perennial tearful pleas concerning the allegation that it is the *American* lines in a Conference which may be "threatened", *by independent American competition,* should long since have lost any appeal.

Another significant design gathered from the Board's statistics is the fact that of the conferences *not using the system* (less than 50 per cent of the total number of approved conferences), sixteen (16) conferences *have no United States-flag member,* as was the case in the recent argument before the Board in *Statement of the Great Lakes-Bordeaux/Hamburg Range Westbound Conference* (Docket 795).[30] That proceeding involved the General Order 76 Application of a Conference, domiciled abroad, consisting of entirely foreign-flag lines, to install the exclusive-patronage system in the trade between the Continent and the Great Lakes. That proceeding disclosed what will prompt these conferences, consisting solely of foreign

[30] Conferences with no American-flag members are as follows: F.M.B. Agreement Nos. 93, 116, 138, 166, 3357, 5300, 7350, 7560, 7820, 7830, 7900, 8130, 8140, 8180, 8250, and 8260.

lines, to install—or attempt to install the system—to wit, the approaching event of one or more American lines entering the trade—as positively portends in the foreign trades in and out of the Great Lakes, when the St. Lawrence Seaway opens.

Isbrandtsen has repeatedly complained to the Board about the fact that some fifty-seven (57) steamship conferences are using the exclusive-patronage system with no independent competition whatsoever, which is contrary to the principles announced even in the Board's own cases.[31]

The Board has done nothing, however, to stop the use of the system in these trades, and has done nothing to effectuate the decision of the Court of Appeals in *Isbrandtsen Company, Inc.* v. *United States*, 211 F. 2d 51 (1954) certiorari denied by this Court, *sub nom. Japan-Atlantic and Gulf Freight Conference* v. *United States*, 347 U. S. 990 (1954), requiring that all such agreements between carriers, including an agreement to use the dual-rate system, be approved by the Board before they could become legally effective. *Only one of these conferences* (the North Atlantic Continental Freight Conference, the approval of which system is

[31] Throughout the Brief, the Board gives lip service to the meaningless principles in the Board's own cases, which do not square with the facts. On page 32 of its Brief, the Board states that, "Absent the finding of grave instability, the Board does not consider the system justified, and it will not permit its use." Again at page 72 of its Brief, the Board states that the system will not be approved where it will "result in a virtual monopoly by the conference lines." Obviously such mollifying standards purportedly adopted by the Board, with the obvious purpose of sustaining its position upon judicial review, mean nothing if they are not followed in practice, which they clearly are not.

now pending review before the Court of Appeals for the District of Columbia Circuit) has ever had its agreement to use the exclusive-patronage system approved by the Board.

Certainly these facts bespeak little in support of the alleged protection given to American-flag lines by the exclusive-patronage system. The question naturally arises, Whom is the Board protecting and from what? There are over seventy-five (75) American-flag liner companies engaged in the foreign commerce of the United States. Only forty-one (41) of these lines belong to any conference, and only twenty-four (24) are members of conferences which employ the exclusive-patronage system. In over ninety per cent of the latter conferences, in which United States-flag lines are members, *where the system is used,* there is no independent competition. The Board's arguments concerning the public importance of its position are certainly misconceived.

D. Proceedings in the Court of Appeals.

The travesty of Board procedures was continued even after the Petition to Review the Board's decision approving the system had been filed, with the Board only thereafter issuing an Order and then an Amended Order.

The Board's Report approving the institution of the exclusive-patronage system as of January 1, 1956, was not served upon the public until Friday, December 14, 1955 (R. 19). This Report at the time of service was not accompanied by an Order as is usual in an administrative adjudicatory decision. Because of the

shortness of time before the system would have become effective (a large part of which was the intervening holiday season), and because the Report did not even specify whether the system would become effective as of Tokyo time or Washington, D. C. time (the former being one and one-half days earlier), Isbrandtsen was compelled to filed its Petition to Review promptly with the Court of Appeals, asking for a temporary stay of the Board's Report (R. 2).

On the day of the filing of the Petition to Review, December 19, 1955, Isbrandtsen's attorney delivered a letter to the Board, calling the Board's attention to the filing of its Petition, which was also delivered, *and to various formal deficiencies in the Board's Report, including the lack of an accompanying Order* (R. 85).

The Board, on December 21, 1955 (seven days after service of its Report), served its First Order in the administrative proceeding, specifying, *inter alia*, that the system was approved "effective January 1, 1956, at 12:00 noon Eastern Standard Time" (R. 73). On January 11, 1956, the Board served its *Second Order* eleven days after the system would have become effective according to the Board's original Report (R. 75).[32]

In the original Report, the Board stated that, "we disapprove the [exclusive-patronage] contract form insofar as it purports to cover F.O.B., or F.A.S. sales" (R. 65). The first Order of the Board reaffirmed the approval of the system effective January 1, 1956, "excepting that said contract system shall not apply to shipments which are made on an F.O.B., F.A.S., or ex

[32] Isbrandtsen's Petition to Review was amended so as to include Review of the Board's Supplemental Orders.

godown basis or to the transportation of cargoes in refrigerated compartments" (R. 74).

The second Order of the Board, served on January 11, 1956, apparently attempted to accomplish a major and fundamental change in the exclusive-patronage contract, by stating that the system would not apply to F.O.B. or F.A.S. shipments "unless the person whether seller or buyer named as shipper in the ocean bill of lading is a contract signatory" (R. 76). The language of the second Order has remained a continuing mystery to Isbrandtsen, and there were no findings whatsoever, either in the Report or in the Supplemental Order, to support what was apparently a new conclusion. Isbrandtsen, therefore, filed a Motion with the Court of Appeals below to remand the second Order of the Board for a proper recitation of the circumstances and reasons prompting it, and for proper findings of fact pursuant to the requirements of the Administrative Procedure Act (R. 77). The Court below finally declared this Motion to be moot, in view of its decision holding the system to be illegal.

The Petition to Review named the United States and the Federal Maritime Board as Respondents (R. 2). The United States, represented by the Attorney General, was the statutory Respondent under 5 U.S.C. sec. 1037. The Federal Maritime Board was added as a Respondent, pursuant to a Rule of the Court of Appeals. The Department of Justice joined Isbrandtsen in attacking the validity of the Board's Orders and the legality of the exclusive-patronage system. Thereafter, the Secretary of Agriculture, the largest shipper in the foreign commerce of the United States, inter-

vened in support of Isbrandtsen's position, and the Japan-Atlantic and Gulf Freight Conference intervened as a Respondent-Intervenor in the support of the Orders of the Board.

E. Decision Below.

In the opinion by Fahy, J., *the Court unanimously held that the exclusive-patronage system was fundamentally unlawful and in violation of Section 14, Third of the Shipping Act of 1916.* In reaching this decision, the Court did not meet the other issues raised by the Petition to Review, concerning the necessary and unavoidable illegality of the system under Sections 15, 16, and 17 of the Shipping Act, and concerning the unconstitutionality of Section 15 of the Shipping Act, if the Board interpretation of the statute were upheld.

Specifically, the Court below held that:

> "Since the dual rate system here constitutes retaliation it must be condemned without regard to the question of reasonableness, as are deferred rebates" (R. 243).

The Court went further, however, to hold that the type of discrimination condemned by section 14, Third of the Act was *absolute discrimination*, and that *Congress had deliberately left out the qualifying words "unjust" or "unreasonable"*, which the Board and Conference had contended should be read in (R. 245). It held that any discrimination against a shipper as a reprisal or retaliation was illegal under the Act. The Court pointed out that, elsewhere in the Act, certain practices were made illegal only if they were unjustly discriminatory.

"But it is significant that when Congress came to the matter of retaliation against a shipper it did not permit this particular type of conduct to be engaged in or to be approved by the Board if it involved any discriminatory method" (R. 245).

Under these circumstances the Court stated that:

"We think it clear not only that the liquidated damage provision is discriminatory but that a 9½ per cent differential for exactly the same service and facilities is of like character" (R. 245).

The Board at page 9 of its Brief mistakenly asserts that the Court "has accepted the Board's finding that the dual rate system is not 'unjustly discriminatory' ". No such acceptance of the Board's argument was given, at all, because the Court did not reach the issue of unjust discrimination under Sections 15, 16, or 17 of the Act. It must be emphasized that Isbrandtsen had stipulated the facts in the Board's Report, and the Court has done nothing more than to say that even if the Board's contentions concerning the need for the dual rate system "in promoting stability of rates and regularity of service" were true, that such an argument is irrelevant when considering the illegality of the system under section 14, Third (R. 242, 243).

The concurring opinion of Washington, J. is fully consistent with the Court's main opinion and it was concurred in by all the judges. Judge Washington answered further the misconceived arguments of the Board, concerning the meaning of retaliation under Section 14, Third and the Board's interpretation of the

case of *Swayne & Hoyt* v. *United States*, 300 U.S. 297, 303 (1937) (R. 246). He went on to point out that Congress could not have "impliedly approved" this particular exclusive-patronage system, as the Board had contended, because it involves a contract of a type that was not before the Congressional Committee when the statute was enacted (R. 247). Judge Washington's conclusions are eminently sound and well reasoned and certainly have not been refuted in any way by either the Board or the Conference.

The Board, on page 35 of its Brief argues that Judge Washington has held that certain requirements contracts would be legal under the Act. The concurring opinion does no such thing. It merely states that were the Board's argument sound that the present type of exclusive-patronage contract had been before Congress prior to the enactment of the Act, "the argument would have some merit" (R. 247). As it was, he found the argument to be without any merit.

The Court below has thoroughly considered and analyzed each of the arguments now advanced by the Board and the Conference. Because the Court found that the exclusive-patronage system was unlawful under Section 14, Third of the Shipping Act, it did not meet or discuss the various other questions of fundamental illegality raised by the Petition to Review. Such additional issues are, however, open for decision by this Court, and Isbrandtsen considers them to be equally as formidable objections to the system as the violation of Section 14, Third.

SUMMARY OF ARGUMENT

Introduction

Although hardly apparent from the Briefs of Petitioners, the controversy here concerns the exclusive-patronage system and not the Conference system, as such. Fundamentally, the question is whether Conference lines, in addition to "controlling, regulating, preventing, or destroying competition" *as among themselves*, may also, through the device of the exclusive-patronage system destroy the competition of independent common or contract carriers who may not wish to become, or cannot legally become, parties to the conference agreement. The Shipping Act gives no express or implied authority to the Board to approve such a practice.

The exclusive-patronage system involves a complete departure from the traditional standards of common-carrier rate making and common-carrier obligations. *The purpose and inevitable result of the system is the destruction of all independent competition in the trade involved.* That independent competition is effectively eliminated by the use of the system is proven by Isbrandtsen's almost complete lack of success in competing against Conferences using the system in the trade from the Philippines and Hong Kong, and even more vividly by the fact that of some fifty-seven (57) of the sixty-two (62) conferences, [of the one hundred and twenty-five (125) steamship freight Conferences on file with the Board], *now using the system, are faced with no independent competition.* The Board, in the

past, on various occasions, has admitted that the basic purpose of the system is to eliminate all independent competition, and that *if the system "is wholly effective it will result in a complete monopoly" for the conference lines.* There can scarcely be any doubt that Isbrandtsen, as an independent carrier, could not continue in this trade in competition with such an effective exclusive-patronage system.

The Members of the Federal Maritime Board, themselves, have publicly stated their confusion as to how a situation arose, where at least sixty-one (61) conferences are now using the exclusive-patronage system, *without Board approval*, in direct contravention of the decision in *Isbrandtsen Company, Inc.* v. *United States*, 211 F. 2d 51 (C.A. D.C., 1954) and two other decisions. Such confusion has been amply exhibited in practice because the Board has done nothing to stop this flagrantly illegal conference activity in the three-year period since the decision in the *Isbrandtsen* case, and in a recent Board decision it has stated that it has no power "to suspend or stay approved or *inapproved* agreements between carriers", although it had previously argued to this Court that it did have such power and others.

Neither the Board nor the Conference has ever discovered one single authority which would lend direct or specific support to their position that the system is legally permissible. They have been forced rather to rest their entire case on so-called "implied approval". Such inferences of "implied approval" they claim to discern from (1) the lack of a specific condemnation of

the sytem in *haec verba* in the Shipping Act, (2) the failure of a *preliminary report* of the House Merchant Marine and Fisheries Committee in 1914 to specifically condemn it, and (3) the failure of the Courts to decide the issue of legality, even though the issue was never before the Courts. The arguments of Petitioners constitute nothing more than grasping at straws, which were quickly and correctly dismissed by the Court below after a thorough analysis. Congress did condemn the system, in principle, at the very least, in the Shipping Act. It is unthinkable that Congress would or could authorize the legality of such a predatory system by *implication*, which would involve a partial repeal of, and exemption from, the Anti-trust Laws. The approach of "implied approval", involving an exemption from the Anti-trust Laws, is contrary to all recognized authority concerning statutory exemptions from the Sherman Act.

I

Section 14, Third is amply clear on its face, without any resort to legislative history, and the exclusive-patronage system clearly violates the statutory proscriptions therein, as the Court below has found. The Board itself recognizes that a "literal reading" of the statute would prohibit the use of the system. Section 14, Third is intended to prohibit direct or indirect "retaliation" by a common carrier, or group thereof, or "resort to other discriminating methods" against a shipper because the shipper "has patronized any other carrier" or has taken some other action which Congress considered he had a perfect right to do.

There can be no question that the exclusive-patronage system is "retaliatory", or that it involves "resort to other discriminating methods" against the shipper who refuses to sign the exclusive-patronage contract, or against the shipper who would sign such an illegal contract and thereafter use a non-conference carrier. It would provide for charging the non-signer the higher penalty non-contract rate, and it would impose severe retaliatory penalties on the latter contract shipper who would "violate" his contract. It is unimportant whether such "retaliatory" or "resort to . . . discriminating methods" is taken because the shipper "has patronized any other carrier" or because he has refused to sign or to be bound by the exclusive-patronage contract not to patronize and to "boycott" any other carrier. Either type of retaliation or discriminatory action by common carriers is specifically outlawed by the statutory provisions, as the Court below has found.

It cannot seriously be contended that Congress "overlooked" the insertion in Section 14, Third of such qualifying adjectives as "unjustly" or "unfairly" in proscribing "discriminating" conduct by common carriers. Congress obviously intended to prohibit any type of discrimination against a shipper taken as retaliation or reprisal against him because he had done something which he had a perfect right to do, including his refusal to sign an exclusive-patronage contract with the common carriers, or his patronizing of another carrier. That such *absolute* discrimination was intended to be proscribed is not only clear on the face of the statute but also from the fact that the House Committee had

originally recommended language which would have established a qualified proscription of discrimination, but such qualifying words were deliberately omitted by the drafters of the Shipping Act and by Congress.

There is certainly no necessity to resort to legislative history to determine the clear and unambiguous meaning of any relevant provision of the Shipping Act. The Board's approach of refusing to apply what the statute clearly says, but rather to inquire continually into what the Board chooses to think the legislature meant, is fundamentally improper. Nevertheless, there is no direct support for Petitioners' position to be found anywhere in the legislative history. The Board and the Conference rely entirely on a preliminary or interim account of hearings held by the so-called "Alexander Committee" in 1914, two years prior to the passage of the Act. Their *only* argument concerns a summary in this interim account of Committee proceedings, of certain self-serving *arguments* made by interested witnesses appearing before the Committee. There is not one single word of approbation in this preliminary summary of the Committee, or elsewhere in the legislative history concerning *any* type of exclusive-patronage system.

It seems clear beyond any doubt that the exclusive-patronage *pre*ferred rebate system, the modern counterpart of the exclusive-patronage *de*ferred rebate system, was not in use in 1914, when the Alexander Committee held its hearings, or at any time prior to the enactment of the Shipping Act, as the Court below has found. The system was, therefore, incapable of any "implied congressional approval" as contended for by

the Board and the Conferences. The Shipping Board found in 1926 that the present-type exclusive-patronage *pre*ferred rebate system was first used in 1922, six (6) years after the enactment of the Shipping Act, and then applied to only one commodity. These facts are corroborated by information supplied to the Board by the Conferences themselves.

Even if the system had been in use when the Act was drafted and passed, however, there would be no force to Petitioners' arguments, for not one single word of approbation was given to any such system in any recommendation of Congress. In the Final Report accompanying the Shipping Bill, the Committee recommended that all "rebating of freight rates to shippers be made illegal". Congress also made it plain that they were prohibiting any common carrier from "retaliating against any shipper who refuses to use that particular line in the shipment of his freight", and that "ordinary rebates . . . just as obnoxious to common sense and good reason", as deferred rebates, were prohibited. These proscriptions are written plainly in the Shipping Act.

II

Except in the Briefs filed by the Board and by Conferences with the Courts, it has generally been conceded that, until the decision of the Court below, herein, there had been no definitive judicial decision on the legality or illegality of the exclusive-patronage system. This undeniable posture of the cases has in fact been publicly admitted by the Board's Chairman in his testimony before the House Merchant Marine and

Fisheries Committee, six days after the Board had filed herein its Petition for certiorari with this Court, and it has been found similarly in every judicial decision that has ever considered the point. It is preposterous, and will undoubtedly come as a considerable surprise to this Court, itself, that Petitioners would contend that this Court has previously held the system "not unlawful *per se*" or "lawful *per se*", *by implication*, not only through a footnote to a case *not involving the issue*, but also through its action of remanding cases to the Board, on the ground that the Board had *primary* jurisdiction to determine *factual* circumstances, or through its action of remanding cases to the Board because of the Board's traditional and inherent procedural deficiencies, such as no hearings or findings, or even consideration of "approval", after the Courts had specifically held such approval was necessary as a condition precedent to use.

III

The Board's administration of the Shipping Act concerning the exclusive-patronage system has been anything but consistent, as was found by the Statutory District Court in *Isbrandtsen Company v. United States*, 96 F. Supp. 883 (S.D. N.Y. 1951). Prior to the Second World War, the issue of illegality of the system under Section 14, Third of the Act had not been specifically discussed in any Board decision. The first case of the Shipping Board to consider the system in 1922 had held it fundamentally illegal, as "unjustly discriminatory" and "unduly prejudicial" *under Sections 16 and 17* of the Act.

After World War II the issue of the illegality of the system *under Section 14, Third* of the Act was first raised before the Board in 1948, in the first cases in which the Department of Justice and Isbrandtsen appeared as opponents of the system. Since that time there has been a continuous attempt to obtain a final decision from the Courts on the fundamental legal issues, which efforts, until now, have been unavailing, largely because of the Board's own procedural deficiencies and delaying opposition. In its *post-war* opinions, the Board has striven to justify the use of the system, starting from its preconceived notion that the system was legal, on a variety of misconceived and inconsistent theories under Sections 14, Third, 15, 16, and 17 of the Act. The so-called "principles" announced in these cases of the Board, if applied, which has not been done, would themselves prohibit the use of any exclusive-patronage system.

IV

Even irrespective of the unavoidable illegality of the exclusive-patronage system under Section 14, Third of the Shipping Act, the system is fundamentally unlawful for various other substantial reasons, which issues it was unnecessary for the Court below to meet, in view of its decision holding the system illegal under Section 14, Third. These additional and further obstacles which the system would have to pass muster, in order to be rendered legal, are of great importance, *and such issues are now before this Court;* they constitute further cogent reasons why the Judgment of the Court below should be affirmed on even broader grounds

than announced in the Opinion below. Such additional grounds for holding the system illegal are as follows:

A. The system is necessarily and fatally illegal because it is "*unjustly discriminatory*" and "*unduly prejudicial*" in violation of Sections 15, 16, and 17 of the Shipping Act, because it involves the charging of different rates to *identically situated shippers for identical transportation services.*

B. The Board could have no discretion or jurisdiction to approve the system because it involves as its main and most essential ingredient an exclusive-patronage contract entered into between common-carrier conference lines and *shippers, the latter parties not being "persons" subject to the Shipping Act, nor, therefore, capable of receiving any immunity or exemption from the Anti-trust Laws, which might be given by the Board to carriers pursuant to Section 15 of the Act.* This Court has previously held that such exclusive-patronage arrangements, stripped of any immunity, are fundamentally violative of Sections 1 and 2 of the Sherman Act.

C. The Board's interpretation of the Shipping Act would render Section 15 of the Act unconstitutional. It would involve *an unlawful delegation of legislative authority to an administrative agency, which in turn would be passed on by the agency to private monopolistic cartels,* in violation of Article 1, Section 8, paragraph 18 of the Constitution of the United States. Such interpretation would, moreover, give the private monopolists the absolute power to exclude any independent carrier, whether common or *contract* carrier, from the conference trade, and *would exceed the extent*

of permissible deprivation of property without due process of law, in violation of Article V of the Constitution. *Contract carriers, or so-called "Tramps" could never join the conference*, moreover, *even though the commodities which they would ordinarily carry would also be carried by the conference lines*, because they are not "common carriers" subject to the Shipping Act. Such carriers would have to become common carriers or retire from business. This would be the equivalent of giving the private monopoly the power to issue certificates of public convenience and necessity, with no statutory guide for their issuance.

ARGUMENT

Introduction

Although it is not completely apparent from the Briefs of the Petitioners, *the controversy here concerns the exclusive-patronage system and not the Conference System, as such.* Isbrandtsen has not raised any issue, either before the Board or in its Petition to Review, with respect to any Conference practice of fixing *uniform* rates as between Conference member lines, so long as such rates apply equally and uniformly to all shippers without the invidious discriminations inherent in the exclusive-patronage system.[33] Fundamentally, the question is whether the Conference lines, in addition to "controlling, regulating, preventing, or destroying

[33] As previously pointed out, *supra*, pages 18 and 34, the evidence shows that the Conference Member lines traditionally have not adhered to their *own* published tariff and have been guilty of secret rebating and other malpractices in violation of the Act [Sec. 16(2)] and their own Conference agreement.

competition" as among themselves, may also through the device of the exclusive-patronage system destroy the competition of common or contract carriers who may not wish to become, or cannot legally become, parties to the conference agreement. Nowhere in Section 15, or in any other Section, of the Shipping Act, 1916, is there any authority given to any Conference or any carrier to employ dual rates or to employ an *exclusive-patronage* system of any type.

Both the Board and the Conference make substantially the same three main points in their arguments, namely, (1) they argue that the Court below was wrong in interpreting Section 14, Third of the Shipping Act, (2) that the legislative history of the Act demonstrates that Congress "did not intend to prohibit the dual rate system", and (3) that the decision below is in conflict with prior Court and Agency decisions.

The Court below did not go beyond the single issue of illegality under Section 14, Third of the Shipping Act, holding correctly that the system was necessarily and unavoidably unlawful in contravention of the statutory proscriptions therein contained. There are, however, equally serious further objections of illegality to the exclusive-patronage system—even if the system were able to pass muster the proscriptions of Section 14, Third. These other provisions of law which the system would violate are several.

At the very least, the system would be unduly prejudicial and unjustly discriminatory in violation of Sections 15, 16, and 17 of the Shipping Act.

Furthermore, the system could never be legally approved because the cornerstone of such system involves

an agreement between carriers and *shippers*, the latter not being subject to the Shipping Act and incapable of receiving any immunity from the Anti-Trust Laws.

Most importantly, should the Board's interpretation of legality "*per se*" be held valid, Section 15 of the Act would be rendered unconstitutional.

A. Nature of the Exclusive-Patronage System.

The exclusive-patronage system involves a complete departure from the traditional standards of common-carrier rate-making and common-carrier obligations. It is remarkable that anyone could contend that such a system, intended to monopolize the trade for Conference carriers and to destroy all competition, could, at least, without specific Congressional authorization, ever be subject to approval by the Federal Maritime Board so as to afford the system immunity from our Anti-Trust Laws. The astonishing nature of this system is most vividly delineated by a mere summary of its salient and admitted features:

(1) Two sets of rates—one of which is higher by an arbitrary differential of 9½ per cent—are charged by the *common carrier* Conference lines for *precisely the same transportation service;*

(2) The sole consideration entitling a shipper to the lower "contract" rates is his agreement not to patronize—i.e., to boycott—any non-conference carrier;

(3) There would be little or no consideration for such contract given on the part of the Conference lines, and neither the Conference nor its member lines would guarantee to provide any certain amount of shipping

space to the contract shipper or guarantee to carry such shipments as he would offer;[34]

(4) The discrimination in rates is entirely unrelated to volume or frequency of shipments—indeed, the contract shipper would undertake no obligation to ship any freight at all;

(5) The higher non-contract rates would be exacted from shippers solely because they would refuse to sign a contract to employ the Conference lines' vessels exclusively and refuse to agree not to patronize any independent carrier;

(6) The contract shipper would be subject to severe retaliatory penalties for employing the service of an independent carrier, including being compelled to pay the higher non-contract rates and becoming liable for

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[34] Under the exclusive-patronage contract between the Conference lines (signed, however, by the Conference Secretary) and the contract shippers, the consideration flows entirely from the shipper. The Conference lines promise to do nothing that they would not do in the ordinary prudent conduct of their business, nor which they are otherwise obligated to do under their legal obligations as common carriers. They *do not guarantee the contract shipper any certainty of shipping space or service* under the exclusive-patronage contract (R. 203). The lack of any consideration on the part of the Conference lines is well summarized at page 5 of the Conference Brief as follows:

> ". . . the Petitioners [i. e., the Conference lines] operate their vessels for their own account and profit; conduct their own businesses in such manner as their respective managerial judgments may determine; build such ships to be used in the trade as they may think appropriate; have as many or as few sailings as they may deem best; . . ."

Even if such an exclusive-patronage agreement in restraint of trade were not illegal and void, the consideration would have to be adequate, not colorable, and the restriction would have to be reasonable. *Oregon Steam Nav. Co.* v. *Winsor*, 20 Wall. (U. S.) 64 (1874).

50 per cent of the freight which he would have paid at Conference contract rates;

(7) The exclusive-patronage contract—*the key to the system*—would be entered into between the Conference acting for its member lines and shippers for an indefinite period of time;

(8) Because the Conference lines collectively offer a greater and more comprehensive service, many shippers would be coerced into signing exclusive-patronage contracts; and

(9) The intended and inevitable result of the exclusive-patronage contract system would be to monopolize the trade in the hands of the carriers employing the system.

B. The System Would and Does Destroy All Independent Competition

There can scarcely be any doubt that the purpose and inevitable result of this or any other exclusive-patronage system is the destruction of all independent competition in the trade involved.

The use of the system in this particular trade during the pre-war years did in fact eliminate all liner and virtually all tramp competition, as the Board has found (R. 25). There are countless examples of the destruction of independent competition by the use of the exclusive-patronage system, which certainly completely refute the fantastic and unfounded prognostication by the Board in this case that Isbrandtsen would carry approximately 16 per cent of the cargo after the system had been instituted (R. 34).

Speculation over the fate of Isbrandtsen or any other line, as an independent, in competition with a conference using the exclusive-patronage system is unnecessary—one need look no further than the services in this trade from the Philippines and Hong Kong, where the system is now in use. These facts are set forth in the Board's Report and are peculiarly related to the use of the system in the trade from Japan, for, as has been pointed out, no carrier exists upon Japanese cargo alone. During the period between 1950 and 1952, shown in the Board's Report, Isbrandtsen, in competing with the Conference lines using the exclusive-patronage system from the Philippines, provided slightly more than *thirteen (13) per cent of the total sailings and carried less than two (2) per cent of the total cargo moving in that trade* (R. 27). This is a graphic and vivid example of the inevitable effect of the exclusive-patronage system on independent competition. Any suggestion that a different result would follow in this case obviously has no relation to reality and is not founded on any proof.

Isbrandtsen has been persistent in not succumbing to the pressures of these foreign-dominated steamship cartels. Over the years, other operators which have maintained such independence have been forced to submit. As has been pointed out, sixty-two (62) conferences now use the exclusive-patronage system, and the Chief of the Board's Regulation Office in his Affidavit submitted to the Court below could find independent of non conference competition in the cases of only eight (8) conferences (R. 133). As we have pointed out (pages 49 to 54, *supra*), there has been a steady

attrition of even this minimal competition. At the present time, only seven (7), at most, of the sixty-two (62) Conferences using the system have any independent competition, and in at least two (2) of these trades (Atlantic-Malay States and Atlantic-Far East), the competition of Isbrandtsen (which is the only competition listed) is practically non-existent, by reason of the fact that Isbrandtsen's vessels do not make direct sailings in the trade. For all practical purposes, therefore, only five (5) of the sixty-two (62) conferences using the system are confronted with non-conference competition.

These are the facts concerning the results of the system which its proponents must admit. It is absolutely contrary to fact for the Board and the Conference to indulge in mollifying nonsense about the differential not being so great as to drive the independent line out of the trade, as they have done in their briefs (Bd. Br., p. 9; Conf. Br., p. 17). The plain fact is that no independent can continue to exist if all of the customers are tied up in exclusive-patronage contracts, and, moreover, no independent can, thereafter, arise or enter the trade.[35]

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[35] In addition to other reasons cited herein, a shipper is coerced into signing the exclusive-patronage contract, in order to obtain the lower contract rates, by the fact that the differential between the contract rate and the non-contract rates often approximates his margin of profit, as the Board has found (R. 68). Likewise, by the same coercion, he would be compelled to continue to patronize the Conference lines, during the indefinite term of the exclusive-patronage contract, without being able to take advantage of any lower rates which might be offered by any independent carrier, if there could ever be an independent available, because during the three months' period required for the shipper to give notice to the

The Board in the past has been more frank in admitting this unmitigated purpose and inevitable result of the system. Its own counsel made the following statement to the statutory District Court in *Isbrandtsen Company, v. United States*, 96 F. Supp. 883 (S.D. N.Y., 1951):

> "That the purpose of the dual-rate provisions was, if possible, to bring about a condition in which an independent carrier [such as Petitioner, Isbrandtsen] could be compelled (through loss or threatened loss of profits) either to join the Conference or go out of business."
>
> " . . . [I]f a contract system is wholly effective it will result in a complete monopoly. . . Necessarily, in these circumstances, there would be no service by independent operators."

The Board's attempted prognostication of Isbrandtsen's continued participation in this case (R. 34) is to be contrasted, moreover, with the expressions of the Board's Chairman in the companion case, *Statement of Trans-Pacific Freight Conference of Japan*, Docket No. 743, covering the same trade from Japan but to the Pacific Coast of the United States. The *Trans-Pacific* case was decided on December 19, 1955 (one week after the Board's decision in the instant case), *but was not served on the public until March 5, 1956.* In his dissenting opinion, the Board's Chairman makes his views precisely clear:

Conference of the cancellation of his contract, he would be precluded from taking advantage of the lower rates of the independent even though they were necessary, profitwise, to permit him to stay in business.

> "In considering an application to institute a dual rate system *in any trade, we must recognize the immediate purpose of the system, simply stated, to be the elimination of non-conference competition, as such,* . . ." (Mimeographed Report, page 33).

With respect to prognostications of how much cargo the conference or independent would carry after the system were to go into effect, the Board's Chairman stated:

> "such a test must necessarily be based *wholly on pure speculation* as to relative amounts of cargo which will be carried, after initiation of a dual rate system, by conference and non-conference carriers." (*Ibid.*)

The Chairman left no doubt that approval of the system contemplates that all independents would be forced to join the Conference or go out of business:

> "To test the validity of a dual rate system by its effect on independent operators is to permit the tail to wag the dog . . . The non-conference operator's handicaps in the face of a dual rate system, . . . are self assumed." (Mimeographed Report, page 34).

If any result contrary to the above facts and Board admissions were to occur, why has the Board allowed some fifty-seven conferences to use the system after they have driven out all independents and are confronted with no competition? This anomalous situa-

tion has been brought to the Board's attention on various occasions by the written complaint of Isbrandtsen, and, for the most part, no written reply has even been received. The astonishing situation was again alluded to by Counsel for Isbrandtsen in an argument before the Board on September 17, 1957, involving the attempted use of the system by a group of entirely foreign-flag lines in the trade from Europe to Canada and to Great Lakes' ports of the United States [*Statement of the Great Lakes-Bordeaux/Hamburg Range Westbound Conference*, Docket 795]. The matter was the subject of questioning of the Board's Public Counsel by the Board Members, *at least one of whom indicated that he did not know how the various conferences now using the system had ever obtained the authority.* The following colloquy took place among Board Member Guill, Mr. Schmeltzer, the Public Counsel, the Board's Chairman, Mr. Morse, and Board Member Stakem.

"Mr. Guill: May I ask you this, what about all these conferences that have a dual rate system that are now in effect? How did they get them in the first place?

"Mr. Schmeltzer: There have been many recent cases that we have to follow. One of them is 211 F. Second, Isbrandtsen v. United States—I think 211 F. Second, '55—which says the dual-rate system is something that must be approved by the Board specifically.

"The cases you are talking about happened long before that, sir. The law as it now stands requires the Board to approve the dual-rate system in any case before it goes into effect.

"Incidentally, I would like to say one further thing.

Where there is a dual-rate system in effect and shippers are being hurt or an independent carrier is being hurt, it can bring an action before the Board and have the Board take away the approval of the dual-rate system.

"The Chairman: All right. Now, under your theory, in the situation where there is an existing dual-rate system, assuming it has been approved by the Board, a year goes by say and there is no overtonnaging; there is no non-conference competitor in the trade.

"Should the Board then withdraw the privilege of having a dual-rate system?

"Mr. Schmeltzer: If there are complaints about such a thing, the Board will listen to the complaints, have a hearing and determine whether there is a need for the dual-rate system.

"The Chairman: Well, suppose Mr. Isbrandtsen comes in and says, "I haven't decided what I want to do, but maybe sometime I want to go into that trade."

"Mr. Schmeltzer: Well, even if he does go into the trade, there is no danger of instability at that time. You are saying that as long as there is a non-conference carrier anywhere in the world that the dual-rate system can be used in any trade in the world, then you are saying that the dual-rate system is legal per se, and the Act does not say that and the legislative history does not sanction that. This was to prevent——

"The Chairman: Well, does the Act say the dual-rate system is unlawful per se?

"Mr. Schmeltzer: It does not say it is unlawful per se. That I worked very hard to prove.

"The Chairman: Well, if it doesn't say it is unlawful per se, then it is automatically lawful per se.

"Mr. Schmeltzer: No, sir, not by any means. It is neither lawful nor unlawful per se.

"The Act says in my opinion the law has power to approve a dual-rate system if it meets the standards of Section 15.

"The Chairman: Well, you and I are not talking the same language. Every Section 15 agreement has to be approved.

"Mr. Schmeltzer: That's right. If there is approved Section 15 agreement which encompasses the dual-rate system, then it is legal because the Board has said that it follows the standards of Section 15. That doesn't mean that every time a conference wants to institute a system it is automatically lawful.

"Things do not have to be either lawful per se or unlawful per se. These things are subject to the Board's discretion which it should exercise under the standards it sets up in liner cases.

"The Chairman: All right, now, let's get back to my situation, though, where there is an existing dual-rate system and there is stability, there is no non-conference competition.

"Mr. Schmeltzer: There is stability, there is no non-conference competition.

"The Chairman: And there is not overtonnaging.

"Mr. Schmeltzer: You are describing this trade I think, in my opinion you are.

"The Chairman: No, I am saying a situation where there is an approved, existing dual-rate system.

"Mr. Schmeltzer: Oh, I see.

"The Chairman: Under your premise, aren't we then obligated to withdraw that dual-rate system?

"Mr. Schmeltzer: I think there would be an impossible policing job to do that. I think the Board would have so many hearings——

"The Chairman: That is one of our burdens.

"Mr. Schmeltzer: I think where there is a complaint, the Board has to hear it and see if it should be disapproved or not.

"The Chairman: I agree on that. We have to hear it if there is a complaint.

"Mr. Schmeltzer: I think there is no reason that because the policing action cannot be perfect in all cases, that this theory doesn't hold water, where there is a proceedings

"Mr. Stakem: Do you agree generally with Mr. O'Connor's statement out of the sixty-seven dual-rate systems in existence there are only about eight in which there is non-conference competition?

"Mr. Schmeltzer: It is not in this record.

"Mr. O'Connor: Yes, it is. Not in this record, it is in the Supreme Court record.

"Mr. Schmeltzer: It is not in this record.

"I think there aren't too many, we will check it and let you know if it is a matter of fact we can provide very easily. I think it is probably correct.

"Mr. Guill: On the basis, then, if in the Board's finding the dual-rate system is not legal per se except under certain standards, why shouldn't those agreements be withdrawn if they are not using them?

"Mr. Schmeltzer: If they are not using them, why shouldn't they be withdrawn?

"Mr. Guill: That's right; if it is merely a matter of

restraining competition as Mr. O'Connor says, and apparently that is what it is on the face of the thing.

"Mr. Schmeltzer: Not under any opinions of the Board, not under Mr. Morse's—you are putting me in the position here now of saying it has got to be one or the other.

"No, the Board has had standards, they have had them for years. The fact the standards could not always be effectuated is another matter. When we have a proceeding we have to follow the standards in other proceedings."

After this considerable questioning, concerning the hopeless dilemma of the Board's non-regulation of the steamship conferences, the Board's Public Counsel was finally forced into a position of admitting that the Board had been obviously delinquent in allowing the many conferences which use the system to do so without approval, as witnessed by the following colloquy:

"Mr. Guill: If they are not meeting the standards, should they be allowed to keep the dual-rate system?

"Mr. Schmeltzer: No, they should not. If the trade —*I am being forced to take a position here and I think it might be a good time to take it*, I think that 211 F. Second, the Isbrandtsen case, the Board has got to review every dual-rate system and see if there is any need for every outstanding dual-rate system that is not given its approval.

"The fact is that it was an impossible job I think for the Board to do at that time. I think the Board should get busy and do it as soon as it is feasible. I

think it wouldn't have been very good for Mr. O'Connor because he would have been spread so thin at that time—

"Mr. O'Connor: I kept demanding it time and again but I got no response.

"The Chairman: What other points do you have to make?"

This travesty enacted by the Board in its administration of the Shipping Act is amusing, if it were not so serious to the persons concerned. The Board has showed no concern with the active regulation of steamship conferences. Its primary efforts have been devoted toward the development of theoretical so-called "principles" that are never put into practice, and which would become academic after all non-conference competition had been eliminated. Academic or moot, however, the Board, in theory, *but not in practice,* still clings to them.

We repeat, therefore, that the system must be judged on the obvious factual basis that it will destroy all independent competition, including that of Isbrandtsen, once it has gone into effect. The *ex cathedra* observation of the Board, in its Report, that ten per cent of the cargoes would remain for Isbrandtsen is contrary to any proved fact and wholly unrealistic, and, as the Board's Chairman has admitted, is based on "pure speculation". This "speculation", we urge, is not even serious. It is crystal gazing. Isbrandtsen would be at the complete mercy of the Conference once the system had been put into effect, and would have no recourse when its carryings fell below said ten per cent,

or when they were reduced to zero.[36] No more eloquent proof of this may be offered than the present situation where approximately fifty-seven Conferences, by the Board's own admission, are now using the system, without any independent competition—and the Board is doing absolutely nothing to stop them. The Board members themselves are confused as to how such a situation arose and as to why it has not been attended to by the Board. Of course, once all independent competition has been eliminated, the protection of such independent competition by the Board becomes a matter which is entirely academic and moot—a situation

[36] Although the Board had previously argued to this Court in *Isbrandtsen Company* v. *United States*, 211 F. 2d 51 (C. A. D. C., 1954), cert. denied 347 U.S. 990 (1954), that it had "plenary power over all Conference activity," including the power to "disapprove, cancel or modify any agreement" in any manner as it might deem proper, and the power to "direct the conference to suspend rates under sanction of cancellation of the basic agreement," the Board has since denied this power in *Agreement Pertaining to Brokerage of Pacific Coast European Conference* (Docket 767, decided December 2, 1955). In that case, the Board found that the Conference was operating under an unapproved modification of its basic agreement—one that the Board's Regulation Office had specifically rejected—and that the carriers had deliberately adopted the modified agreement on October 5, 1954 and applied it retroactively to September 29, 1954. Not only did the Board flatly disavow any power to stop this illegal conference activity, which it had represented it had to this Court, in the previous appeal of the Board's action in this very Japan-Atlantic and Gulf Freight Conference case, but it refused to submit the case to the Department of Justice for appropriate action. The Board stated specifically that it considered itself "to be without authority, express or implied, to suspend or stay approved or *un*approved agreements between carriers." In other words, once a *basic* conference agreement has been approved by the Board it is inviolable and immune from further regulation as to any practices of the Conference, under it or outside of it!

which the Conferences have practically succeeded in accomplishing. The Conference involved in this case seeks to join the legion of 62 victors.

C. The Arguments of the Board and Conference Rest on So-Called Implied Approval

The Board and the Conference have always grasped at the slightest straw in an effort to find the faintest color of authority which would sustain the legality of the exclusive-patronage system. In these entire arguments, not one statutory provision, legislative recommendation, or judicial decision can be pointed to which would give any specific or direct legitimacy to their arguments. Neither the Board nor the Conference has ever found a case,[37] under the Shipping Act or any analogous transportation statute, which has approved such a predatory and monopolistic practice, contrary to all transportation law. The Board and Conference arguments, which all rest upon "implicit" "approval," spun out of lack of specific "condemnation," can be summarized as follows:

(1) It can be inferred from the statute that the exclusive-patronage system is not unlawful because it has not been condemned specifically by name;

(2) It can be inferred from the legislative history (the preliminary Report of the House Merchant Marine and Fisheries Committee; is always relied upon, rather than more valid legislative history, that Congress "impliedly approved" the exclusive-

[37] Other than the Board's own cases.

patronage system because the preliminary Committee Report did not condemn it;[38] and

(3) It can be inferred from the Court decisions, involving the use of the system, remanding cases to the Board on the ground of *primary* jurisdiction, or from a case upholding the *Board's* decision *prohibiting* use of the system, that the Courts have by *implication* upheld the legality of the System, *sub rosa*, *dicta* footnotewise, or *sub silentio*.

Such far-fetched arguments can be quickly dispelled —if one were put to meet such twistings—as they were by the Court below. It is perhaps sufficient answer to these warped interpretations, deducted from latent sources, that this particular type of exclusive-patronage system was not in use when the Shipping Act of 1916 was enacted, and it was therefore impossible for Congress to give it any "implied approval" if such a method of legislating could ever stand up—any more than Congress would "impliedly approve" some other illegal practice or device that the Conference monopolies might subsequently concoct. In *Swayne* v. *Hoyt* v. *U. S.*, 300 U.S. 297, 307 (1936), this Court recognized that the exclusive-patronage contract system "does not differ substantially from [the] 'deferred rebate' [system] outlawed in both foreign and domestic coastwise shipping by § 14 of the Shipping Act." But even if, arguendo, the practice had been in use, we submit it has been con-

[38] The Brief of the Board is illustrative of these traditional arguments. It employs throughout such terms as the following: "impliedly approved" (p. 12), "free of any hint of disapproval" (pp. 12, 41); "implied Congressional endorsement" (p. 13), "impliedly approving" (p. 14).

demned by the clear words of the statute, which the Board chooses to ignore, and by the specific recommendations of the Congressional Committee which were before Congress. The Court below so found.

The Board's attitude in considering the illegality of this Conference practice has been that unless prohibited in *haec verba*, it must be legal "*per se*". Such an argument is an astonishing departure from the traditional interpretation of statutes involving an exemption from prior legislation, especially the Anti-Trust laws. The implication of legality claimed by the Board would confer upon the Conference, a private cartel—in this and *most* instances controlled by foreign citizens the absolute power to exclude any independent carrier—even an American citizen, as in this instance—from the trade, unless the independent joined the conference. It would, moreover, give these private polygopolists the absolute power to prevent *tramp*, contract, or private carrier operations in the Conference trade, because under the law such carriers cannot become parties to agreements under section 15 of the Shipping Act, since only agreements between "*common* carriers" and "other persons subject to the Act" can be approved by the Board thereunder. This extraordinary exclusionary practice, which the Board claims to be legal "by implication", would be the equivalent of giving to these private cartels the power to issue certificates of public convenience and necessity, with no statutory guide for their issuance.

Certainly, it is inconceivable that such a broad and destructive power would ever be put into the hands of private cartels, and it is absolutely unimaginable that

Congress would have granted such a power *by implication*. In the case of *Thomsen* v. *Cayser*, 243 U.S. 66 (1917), which arose before the enactment of the Shipping Act, 1916, this Court held that the exclusive-patronage *de*ferred-rebate system was in violation of Sections 1 and 2 of the Sherman Anti-Trust Act, 15 U.S.C. §§ 1, 2. Insofar as the Anti-Trust laws are concerned, there is no conceivable difference between the exclusive-patronage *de*ferred-rebate system and the instant exclusive-patronage *pre*ferred rebate system—it is merely the difference between a *de*ferred and *pre*ferred "*rebate*". The Board, at page 40 of its Brief, admits the essential similarity between the *de*ferred and *pre*ferred "*rebate*" systems. The case of *Thomsen* v. *Cayser, supra*, therefore—arising just before the passage of the Shipping Act—constitutes a clear-cut holding by this Court that exclusive-patronage systems of conference lines violate sections 1 and 2 of the Sherman Act.

Because the instant exclusive-patronage system, or any other similar to it, would violate the Sherman Act, it could only be lawful if it were capable of receiving an exemption from the Anti-Trust Laws. The Board, as we have stated, claims to have the authority to approve the system, under section 15 of the Shipping Act, and, thereby, to afford the system such an exemption as is provided under section 15. All of this it claims to be able to do by broadening the scope of permissible exemptions under section 15, and by avoiding the restrictive words of the statute, through its argument of "implied approval." Such an approach is directly contrary to all recognized authority considering statutory exemptions from the Sherman Act. Under fa-

miliar rules of statutory construction, it is well established that the creation of a specific exemption in a statute negatives any implication that other and broader exemptions were intended by the legislature. *Bend* v. *Hoyt*, 13 Peters 263, 271, 272 (1839); *Equitable Life Association* v. *Clements*, 140 U.S. 226 (1890). It is also a well established principle that courts do not favor repeals by implication. *United States* v. *Borden Co.*, 308 U.S. 188 (1939); *General Motors Acceptance Corp.* v. *United States*, 286 U.S. 49, 61, 62 (1931); *Henderson's Tobacco*, 11 Wall. (U.S.) 652, 657 (1871); *The State* v. *Stoll*, 17 Wall. (U.S.) 425 (1873); *Posadas* v. *National City Bank*, 296 U.S. 497, 503-505 (1936). Immunity from the application of the Sherman Act cannot be implied by reference to even general legislative policy or to asserted inconsistencies with other statutes, let alone discussions before legislative Committees, but must be expressly granted. *General Motors Acceptance Corp.* v. *United States*, *supra*; *United States* v. *Borden*, *supra*; *Henderson's Tobacco*, *supra*; *United States* v. *Tynen*, 11 Wall. (U.S.) 88, 92 (1871); *Posadas* v. *National City Bank*, *supra*; *United States* v. *Barnes*, 222 U.S. 513, 520, 521 (1911); *Baltimore Nat. Bank* v. *State Tax Commission*, 297 U.S. 209, 212, 213 (1936); *Frost* v. *Wenie*, 157 U.S. 46 (1894). This Court has uniformly applied such strict construction when considering statutory exemptions from the Sherman Act. The Capper-Volstead Act (7 U.S.C. §§ 291, 292) was so construed in *United States* v. *Borden Co.*, *supra*; the Webb-Pomerene Act (15 U.S.C. §§ 61, 62, 65) in *United States, Alkali Export Association* v. *United States*, 325 U.S. 196 (1944); the Transportation Act (49 U.S.C. §§ 71-78) in *United States* v. *South-*

ern Pacific Company, 259 U.S. 214 (1922); the Fishermen's Collective Marketing Act (15 U.S.C. §522) in *Hinton* v. *Columbia River Packers Ass'n*, 131 F. 2d 88 (C.A. Ore., 1942) and in *Manaka* v. *Monterey Sardine Industries*, 41 F. Supp. 531 (D.C. Cal., 1941); the Interstate Commerce Act (49 U.S.C. §1) and supplementary legislation in *Georgia* v. *Pennsylvania Railroad Company*, 324 U.S. 439 (1944).

A number of the above Acts, and other Acts pertaining to transportation (See the Bulwinkle Act, 49 U.S.C. §51, applying to common carrier railroads and Section 412 of the Civil Aeronautics Act, 49 U.S.C. §492, applying to common carrier air carriers) do provide for conference or similar joint-rate practice arrangements. But in none of these Acts has it ever been remotely suggested or contended that any exclusive-patronage arrangement was permissible. Under the three (3) steamship passenger conference agreements, approved by the Federal Maritime Board, it should be noted, there is no provision for any exclusive-patronage agreement, and no such system is used. *In short, the only form of transportation in which any attempt has ever been made to use the system is in ocean freight transportation.*

I. The Court Below Correctly Held That the Exclusive-Patronage System Is Unlawful Because It Violates Section 14, Third of the Shipping Act.

A. Section 14, Third Is Clear on Its Face.

Section 14, Third of the Shipping Act is abundantly clear on its face, as the Court below has found. The

only failure to understand its plain proscriptions, we submit, could arise solely from a refusal to believe that it means what it says. In this respect, from the time that the issue of legality under section 14, Third was first specifically considered by the Board in 1948 [see *Pacific Coast European Conference*, 3 U.S.M.C. 11 (1948)], the Board has refused to face up to the plain words of the statute, and on a variety of misconceived and inconsistent arguments has squirmed to avoid the unequivocal proscriptions.[39]

This statutory section, which it has been so difficult for the Board to grasp, provides as follows:

> "No common carrier by water shall, directly or indirectly, . . .
>
> "Retaliate against any shipper by refusing or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, *because such shipper has patronized any other carrier* or has filed a complaint charging unfair treatment, or for any other reason."

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[39] The Board and Conference Briefs attempt to advance the impression that the ruling of the Court below that the system was unlawful under section 14, Third of the Shipping Act came as a surprising blow to many Conference carriers, who might innocently be subject to statutory fines. There has certainly been no surprise to anyone who has followed the litigation. Since 1948 when the Department of Justice and Isbrandtsen directly attacked the legality of the system under section 14, Third and the Board rendered its decision in the *Pacific European* case, *supra*, the Board's decisions have been under continual litigation even though it has taken virtually a decade to surmount the obstacles repeatedly erected by the Board and the Conferences, in order to present a proper case for judicial review.

The various arguments of the Board and the Conference for avoiding the provisions of this section are inconsistent as well as unfounded—both Petitioners agree, however, that the section should be considered as meaningless. Their arguments are generally as follows:

(1) The Board argues that a literal reading of Section 14, Third could not be proper because it would make certain other sections of the Act, including the First and Second parts of the same Section, 14, surplusage (Bd. Br., 21);

(2) The Board also argues that "Mr. Webster" says that retaliation means "to repay or requite in kind, as an injury" (Bd. Br., p. 22) and that in this case, for unexplained reasons, retaliation means only "the refusal of space accommodations and related services necessary for the transport of goods" (Bd. Br., p. 23);

(3) The Conference argues that Section 14, Third does not apply to rates, because rates are not mentioned in the section;

(4) As a virtual appendage to its Brief, the Board advances what was once the major argument of both the Board and the Conference, *viz.*, that the words "unjustly" or "unfairly" should be assumed to qualify the word "discriminatory" in the section (Bd. Br., pp. 59, 60).

In a very real sense, these arguments of avoidance are hardly to be taken seriously. The Board, of course, understands the plain meaning of the section—it has only refused to apply it. At page 21 of its Brief, it

frankly admits that a literal reading of the section would make every exclusive-patronage system "unlawful and beyond the power of the Board to approve." We quite agree; that is what Congress enacted and what was intended to be the Law—it is the Board's function only to apply and to administer the statute, not to write its own legislation.

It is quite obvious that the basic purpose of Section 14, Third is to prevent direct or indirect retaliation by a common carrier or "resort to other discriminating methods" against a shipper because the shipper has done certain things which Congress felt he should have a right to do, namely,

(a) patronize another carrier, or

(b) file a complaint charging unfair treatment.

In addition, Congress imposed a further restraint upon the common carrier from using retaliatory or discriminatory methods against a shipper "for any other reason"—"other" than the two specified, as above.

The Board, in its deliberate process of searching for bogeymen, claims that the latter phrase makes the section meaningless, because a literal reading would enforce "a flat and unqualified prohibition of *any* discrimination by a carrier (sic.) for any reason." (Bd. Br., pp. 20, 21). Such an argument is only a deliberate attempt to avoid the purpose of the section, which is obviously to prevent *retaliatory* action or reprisals against a shipper because he had done something which he had a perfect right to do. Such "other reasons" might be, for example,

(1) because the shipper has testified against the carrier in Court; or

(2) because the shipper was unwilling to ship all of his goods to or from the ports the carrier might designate; or

(3) because the shipper was unwilling to purchase his merchandise from a company controlled by the carrier; or for a variety of other reasons including,

(4) as found by the Court below, because the shipper ~~has~~ refused "to enter into the exclusive-patronage arrangement" (R. 242).

The Board is intent on carrying its incomprehensible argument, concerning what it considers to be the rule of *ejusdem generis*, to the extreme of reading any meaning out of this statutory proscription. It is well settled that when the intent of Congress is plain, the scope of a statutory enactment cannot be narrowed or whittled away by rules of construction. *Newberger* v. *Commr. of Internal Revenue*, 311 U. S. 83, 89 (1940); *United States* v. *Gilliland*, 312 U. S. 86, 93 (1941); *Texas* v. *United States*, 292 U. S. 522 (1934).

There can hardly be any question concerning what type of action this statute is intended to prohibit. Only those intent upon avoiding it could conceivably raise a question of its meaning. Obviously, in the drafting of any statute Congress may not adequately, with complete exactness, define in every instance what was clearly intended. When the real purpose of the statutory enactment is plain, to those with some familiarity with the subject, especially the Courts, there is ordi-

narily no ambiguity in the statute, and the rule of *ejusdem generis* has little or no application. *United States* v. *Cohn*, 270 U. S. 339, 346 (1926). This Court set forth the proper purpose of the rule of *ejusdem generis* in *United States* v. *Gilliland*, *supra*, emphasizing that the rule cannot be applied for the purpose of "narrowing alternative provisions which the legislature has adopted with the purpose of affording added safeguards", as follows [at page 93]:

> "The rule of *ejusdem generis* is a familiar and useful one in interpreting words by the association in which they are found, but it gives no warrant for narrowing alternative provisions which the legislature has adopted with the purpose of affording added safeguards. 'The rule of "*ejusdem generis*" is applied as an aid in ascertaining the intention of the legislature, not to subvert it when ascertained.'" Texas v. United States, 292 U. S. 522, 534."

The Board argues that a literal reading of Section 14, Third would render as surplusage Section 14, First (prohibiting deferred rebates); Section 14, Fourth (prohibiting, *inter alia*, "unjust discrimination" based on volume of freight or in the matter of cargo space accommodations); Section 16, First (prohibiting the carrier, *inter alia*, from subjecting any person, locality etc. "to any undue or unreasonable prejudice or disadvantage in any respect whatsoever"); Section 16, Second (prohibiting transportation at less than regular charges by means of "false billing," etc., or "by any

other unjust device or means"); and Section 17 (prohibiting unjust discriminations) (Bd. Br., p. 21).

Such "surplusage" argument has absolutely no weight whatsoever, as even the Board seems to concede in the subsequent pages of its Brief (Bd. Br., pp. 22, 23). Sections 14 (Fourth), 16 (First), 16 (Second), and 17 prohibit certain proscribed actions that involve "unjust discrimination", "undue or unreasonable prejudice", "false billing", or "unjust device". Such proscriptions do not necessarily overlap the purview of Section 14, Third which is concerned with making an *absolute prohibition* against "discriminating or unfair methods" employed by a carrier in *retaliation* or reprisal against a shipper. The word "unjust" or "unreasonable" does not qualify the word "discriminating" in Section 14, Third because obviously Congress considered any retaliation or reprisal against a shipper to be unjust or unreasonable.

The Board admits that the statute can be read literally and reasonably, as the Court below has done (Bd. Br., p. 22), but the final and single objection of Board's Counsel, after their discussion is over, is that Section 14, Third would, when read literally and reasonably, also prohibit the use of the exclusive-patronage deferred rebate system which had already been outlawed by Section 14, First. Therefore, the Board argues that the reasonable and literal reading of Section 14, Third cannot be followed because

> "the Congress could not reasonably have enacted both Section 14, First, and Section 14, Third, as it is construed by the Court below" (Bd. Br., p. 23).

The above argument is preposterous. Congress has never been confronted with a shortage of words, and such a word-rationing program has never been followed. Alternative statutory provisions may often prohibit precisely the same type of conduct. See *United States* v. *Gilliland supra*. *There is no such rule of statutory construction that a statutory provision must be narrowed and limited because part of the conduct proscribed might be covered by some other section of the Act.* The Board itself admits in making this argument, that various actions could be prohibited by each of sections 14, 15, 16, and 17 of the Act. The practice before the Board reflects this overlapping of the statutory sections, and complaints are often brought before the Board alleging violations of sections 14, 16 and 17 of the Act, for instance, as well as including other statutory sections, all allegations covering the same action. See, for example, *Edmond Weil* v. *Italian Line*, 1 U.S.S.B.B. 395 (1935) [complaint based on sections 14, 14a, 15, 16, 17, and 18 of Act]. The Board, moreover, in numerous cases has found that the action so complained of violated several sections of the Act. See *Commonwealth of Mass.* v. *Columbian S. S. Co., Inc.*, 1 U.S.M.C. 711 (1938) [sections 15, 16, 17]; *Intercoastal Segregation Rules*, 1 U.S.M.C. 725 (1938) [sections 16 and 18]; *Practices, etc. of San Francisco Bay Area Terminals*, 2 U.S.M.C. 588 (1941) [sections 15, 16, 17]; *Rates from Japan to United States*, 2 U.S.M.C. 426 [sections 15, 16 First, 16 Second, and 17]. The terms "undue prejudice" in Section 16 of the Act and "unjust discrimination" in section 17 have often been used interchangeably and synonymously by the Board.

Philadelphia Ocean Traffic Bureau v. *Export S. S. Corp.*, 1 U.S.S.B.B. 538, 541 (1936); *H. Kramer* v. *Inland Waterways Corp.*, 1 U.S.M.C. 630, 633 (1937).

If the Board's argument about Congress never wasting words were sound, why did Congress provide in Section 15, that Conference agreements which were "unjustly discriminatory or unfair" should be disapproved and also condemn agreements otherwise found "to be in violation of [the Act]"? Certainly, the latter proscription would have been sufficient. Obviously, Congress has not conserved words in framing the Shipping Act—Congress has attempted to proscribe various unlawful practices and has set forth various statutory proscriptions in an effort to prohibit all deleterious practices brought to its attention and all others that might subsequently be devised.

The Board also argues that the definition of the word "retaliation" must be limited to the definition of the lexicographer, which it describes as

> "To return the like for: to repay or requite in kind, as an injury: to put or inflict in return (upon) . . ."

In its Report, the Board had defined the word retaliation as follows (R. 58):

> ". . . To retaliate is defined in Webster's New International Dictionary, 1945 Unabridged Edition, as 'to return like for like' or 'evil for evil'. Retaliation perhaps connotes the idea of vengeance . . . ."

Even if all emphasis were to be placed upon the word "retaliation", as so restricted, the Board's arguments are absurd. The carrier is unable to retaliate in kind, *viz.*, return "like for like" or an "eye for an eye", as the Board implies must be the case. If the shipper patronizes another carrier then there is no precisely simliar "like-for-like" act which the conference carrier could do as retaliation. Congress obviously must have meant something by retaliation other than returning "like for like". The Board, however, argues that the only retaliatory action condemned is the denial of space accommodations to the shipper, thus, by this device, rendering practically all of section 14, Third not only surplusage but nonsense, because the same acts have been prohibited by Section 14, Fourth. The Court of Appeals thoroughly considered these perverted arguments of the Board. Judge Washington, in his concurring opinion, in which Judges Prettyman and Fahy concurred, stated:

> "The crucial question on this appeal is of course whether Section 14, Third, of the Shipping Act of 1916 proscribes the type of contract here involved.
>
> "In the first place, it seems clear that in actual practice the contract system is being used to penalize a shipper because he has patronized another carrier, *or* at least *reserved the right to do so.* Is that 'retaliation,' proscribed by the Act? Certainly there seems no reason to limit 'retaliation' to the dictionary definition of 'returning like for like' or 'evil for evil,' which have been selected by the Board. The very example used by the

statute, boycotting for use of another carrier, is not 'like for like' nor are the boycotting carrier or group of carriers necessarily imbued with ideas of doing evil. But detriment to the independent shipper and the independent carrier plainly results.

"Are these contracts, then, the sort of 'discriminating or unfair methods' that the statute sought to anticipate? That the contract system comes within the literal meaning of this phrase is clear. As the Supreme Court observed in *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 297, 303 (1937), a contract system under which different prices are charged for the same transportation of identical cargoes to identical ports under identical circumstances is 'prima facie discriminatory.' Nevertheless, the Board urges that the literal meaning of the statute should not be followed." (R. 246, 247). [footnotes omitted]

It is difficult to imagine a clearer case of "discriminating or unfair methods" against a shipper because such shipper has patronized another carrier than the exclusive-patronage system.

The Board is speaking with no relation to reality when it states that the Conference is retaliating against the shipper who will not give his exclusive patronage to the Conference solely "because the shipper does not sign the contract". (R. 58). The Board refuses to look at the real purpose of the contract which is to prevent the patronizing of any non-conference carrier. Under the Board's interpretation, the prohibition against retaliation would be meaningless and without

any force whatsoever, because the carrier would always be able to avoid this prohibition by the mere device of holding out any sort of exclusive patronage contract to the shipper, which would prohibit him from patronizing other carriers; thereby enabling the carrier to contend that the unlawful retaliation was *only because the shipper did not sign the contract.*

Neither the Board nor the Conference could scarcely be serious in suggesting that the Conference regards the mere signing of the exclusive-patronage contract as determinative. Of course, the Conference members are not interested in a mere paper transaction—they are concerned only in obtaining all of the shippers' business, and preventing shippers from patronizing their non-conference competitors.

The exclusive-patronage system "retaliates" or "resort[s] to other discriminating or unfair methods" against shippers in at least two obvious respects: First, it discriminates against the shipper, who would choose to maintain his independence of choice to patronize a non-conference line, by exacting from him the higher non-contract rate; and secondly, it discriminates against the "contract shipper" (who has signed an exclusive-patronage contract) for his act of employing a non-conference carrier, by imposing severe penalties upon him. Both of these "retaliations" or "discriminating or unfair methods" are imposed precisely because "such shipper has patronized [another] . . . carrier," which are the very words of the prohibition in section 14, Third.

Neither the Conference nor the Board has even undertaken to answer the second "retaliatory" or "discriminatory or unfair" feature of the system, *viz.*, the

penalty imposed on the "*contract* shipper" for patronizing an independent carrier. This retaliation is most invidious when it is realized that the "contract shipper" is economically coerced into signing the exclusive-patronage contract—as the Board's Report admits (R. 35)—and when it is realized that the threat of this severe penalty would tie the "merchants to a group of lines" in perpetuity.

Even if it were determined that the Conference carriers "retaliate" or "resort to discriminating or unfair methods" against the non-contract shipper only because he would not sign the exclusive-patronage contract and not because "such shipper has patronized any other carrier", such arbitrary and unfair discriminatory action is still prohibited by the proscription that the Conference lines *as common carriers* cannot so discriminate for "any other reason". The Court below, thus, has not relied on any precise technical distinction as to why the retaliation has occurred, for it is largely unimportant. In this respect the Court held:

> "Section 14, Third, applied not only to retaliation for shipping by another carrier but for 'any other reason', *which would include failure to enter into the exclusive contract arrangements.*" (R. 242).

Thus common carriers cannot practice *such retaliatory acts for any reason*, whether it be that they might not like the color of the shipper's hair, his religion, or because he has refused to sign the exclusive-patronage contract.[40]

[40] Certainly the burden so placed upon carriers to refrain from such retaliatory actions is not undue, although the Board at pages 19 and 20 of its Brief apparently suggests that it is.

The argument of the Conference that Section 14, Third does not apply to any "rate practices" (Conf. Br., p. 33) would be equally destructive of the purpose of the section, which, of course, is the Board and Conference intention. There is no authority cited by the Conference that this section does *not* apply to rate practices, and certainly none could be found. A shipper can be just as effectively denied space accommodations by means of a rate practice as by a flat refusal to accept his cargo. For example, if the shipper's competitors are paying a rate of $40 per ton and the carrier seeks to charge him $100 per ton, then he is effectively denied cargo space accommodations because he cannot ship at the higher rate and stay in business. The Board's Brief, it may be noted, is inconsistent with the Conference approach, for the Board admits on page 21 of its Brief that a literal reading of Section 14, Third would obviously make the section applicable to rate practices.

The Conference argues elsewhere in its Brief (page 23) that the charging of a higher rate to a non-contract shipper "is not retaliatory *per se*", whatever that may mean. Thereafter, some concocted and wholly unfounded principles are set forth by the Conference for determining whether there is "retaliation *per se*" as follows (Conf. Br., p. 23):

> "If the less advantageous treatment of a non-contractor is reasonably necessary in the conduct of the vendor's business or in the public interest and no motive of inflicting injury is present, no retaliation exists."

Of course, no authority has been cited for such a fanciful test. Congress has not inserted any test of "motive" into the statute; if the *result* is retaliation or discrimination, because the shipper has done something which he has a perfect right to do, then a violation of the Act has occurred.

As an inconsistent appendage to its Brief, not even in the same section where it discusses the literal reading of Section 14, Third (*viz.*, pp. 19-25), the Board hangs on to the last vestige of what was once its main argument [See *Pacific Coast European Conference*, 3 U. S. M. C. 11 (1948); *Isbrandtsen v. North Atlantic Conference*, 3 F. M. B. 235 (1950)], that the word "discriminating" in the section must be assumed to be modified by the qualifying adjectives "unjustly" or "unfairly" (Bd. Br., pp. 59, 60). The argument is, of course, wholly inconsistent with the Board's previous arguments concerning the interpretation of Section 14, Third, and it is significant that *Conference* Counsel, who once strenuously advocated such an argument, have now seen fit to drop it.

The absurdity of this argument of the Board is perhaps best illustrated by the Board's summary of it, appearing at pages 59 and 60 of the Board's Brief, as follows:

> "Upon this *slender thread*—the omission of the *routine word* 'unjustly' or 'unfairly' in front of the word 'discriminatory' (sic.)—depends the reasoning of the Court below . . ."

The "slender thread" and the "omission of the routine word" involves the central purpose of Section 14,

Third, as both the Board and the Conference seem to recognize elsewhere in their Briefs, Congress, manifestly, considered that any retaliatory or discriminating action taken against a shipper, *because the shipper had done something* which he had a perfect right to do, should be unlawful without more. There could be no question that the so-called "routine words" "unjustly" or "unfairly" were *deliberately* omitted by Congress.

It is indeed surprising that the Board could elsewhere in its Brief argue that Congress could never be supposed to have indulged in word wasting to the extent of passing two statutory sections that might prohibit the same thing, and later argue that Congress was so inattentive and casual as to have omitted unintentionally two words which would have changed the entire meaning of a statutory section.

Resort to the legislative history, we believe, to establish such an *obvious* point is improper. But, nevertheless, if such legislative history is explored, the deliberateness of Congress in omitting the "routine words" is clear beyond any doubt. The Initial Report of the House Merchant Marine and Fisheries Committee, H.R. Doc. 805, 63rd Cong., 2d Sess., made certain recommendations to Congress with respect to retaliation. For example, the Report stated at page 421 that:

> "all carriers should be prohibited from retaliating against any shipper by refusing space accommodations when such are available, or by resorting to other *unfair methods of discrimination*, because such shipper has patronized an independent line, or has filed a complaint charging unfair treatment, or for any other reason."

In the section that became 14, Third, however, *neither* the shipping bill, introduced in the 63rd Congress (H.R. 17328),[41] *nor* the bill introduced into the 64th Congress, First Session (H.R. 15455, which became the Shipping Act; See H.R. Report No. 659, 64th Congress accompanying the Final Bill), followed the precise language of the original Committee Report. Instead, both bills changed the phrase "by resorting to other unfair methods of discrimination" to read, "or by resort to other discriminating or unfair methods". The two phrases are basically different, because the former conveys the concept that some discrimination, when justified, might be allowed, whereas, the latter contains an absolute prohibition against any discrimination of the type described. It is certainly audacious for the Board to suggest (Bd. Br., p. 61) that this major change in language was made inadvertently by Congress. It is obvious that when the actual drafters of the shipping bills disregarded the language in the original Committee Report, they consciously intended to proscribe any discrimination to any extent rather than qualified discrimination as had been first suggested in the preliminary Report.

B. The Legislative History Offers No Support to Petitioners.

Isbrandtsen contends that resort to legislative history in this instance, to determine the meaning of rele-

[41] Section 2(3) of H.R. 17328, 63rd Cong., 2d Sess. provided "that no common carrier by water shall . . . retaliate against any shipper . . . or resort to other discriminating or unfair methods, because such shipper has patronized any other carriers or has filed a complaint charging unfair treatment, or for any other reason."

vant sections of the Shipping Act, involved herein, is neither necessary nor appropriate. Mr. Justice Jackson expressed the following principle in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 395, (1951) which would completely invalidate the argument of the present Petitioners on their presentation of the "legislative history," so called:

> "Resort to legislative history is only justified where the face of the Act is inescapably ambiguous. . . ."

The Board's consistent concern with what Congress meant, instead of attempting to apply the clear words of the statute, is, we submit, fundamentally improper. As expressed by a former Chief Justice, an administrative agency should "not inquire what the legislative meant; [it should] ask only what the statute means." Holmes, *Collected Legal Papers*, (1920).

The "legislative history" which Petitioners have traditionally relied upon, and which they now rely upon, to sustain their arguments is largely a summary merely of the testimony and arguments that were presented to the Congressional Committee at the hearings, practically all of which presentation was the self-serving statements of conference witnesses. It is exceedingly doubtful whether the portions of such "legislative history" relied upon by Petitioners were ever directly before Congress when the legislation was considered and enacted. The Petitioners have avoided assiduously, moreover, any discussion of the actual recommendations which the Committee made in the Report (H. R. Rep. No. 659, 64th Cong., 2nd Sess.), *in 1916*, which accompanied the final Shipping Bill (H. R.

15453, 64th Cong., 1st Sess). Even the arguments that are presented by Petitioners, however, are without the flimsiest support in the "legislative history" *of 1914* to which they resort.

The legislative proceedings preceding the enactment of the Shipping Act are divided into two phases:

First, the United States House of Representatives on February 24, 1912 and June 18, 1912 adopted resolutions directing the Committee on Merchant Marine and Fisheries to conduct an investigation of steamship conferences. That Committee, under the Chairmanship of Hon. Joshua W. Alexander of Missouri, gathered data and testimony over a period of nearly two years. The records of the proceedings were published in four volumes and constitute the preliminary report of the Committee.[42]

Secondly, after the printing of the initial Alexander Committee Report, in 1914, several bills were introduced and extensive hearings were held in both the House and the Senate.

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[42] Investigation of Shipping Combinations, H. R. Doc. 805, 63d Cong., 2d Sess. (1914). Page references given hereinafter in this section refer to that document. While in the Briefs of the Board and the Conference, herein, and generally throughout the years this publication has been referred to as a "Report", it is, in fact not correctly called a Report, as that term is used in connection with Congressional publications. A "*Report*" accompanies legislation, which was before the Committee, and on which some action has been taken. This publication, being a "document" (*viz.*, H. R. Doc. 805) clearly indicates, and it is obvious from its contents, that it was not issued or published in connection with any legislation *then pending before that Committee*, but it is an account of the hearings and proceedings before the Committee, in the conduct of its investigation, rather than any consideration of particular legislation, although at the very end of the document, the Committee set forth approximately nine pages of certain "recommendations"

The Board and the Conference rely entirely on a distortion of this 1914 initial Report of the Alexander Committee (Bd. Br., p. 33; Conf. Br. p. 27). Even this initial Report, however, lends no support to Petitioners. An account of the proceedings before the Committee is published in four volumes; more than three and one-half of the volumes are devoted to summarizing the evidence and testimony received, and the end of the fourth volume contains a digest of the *arguments* presented to the Committee, together with the Committee's recommendations for legislation. It is important to recognize the actual status of this preliminary Report of the Alexander Committee, because *the portions relied upon by the Petitioners are actually nothing more than a summary of arguments which had been made to the Committee at the hearings.* Most of the arguments, of course, were made by the conferences themselves and their member lines. If such self-serving arguments made to a Congressional Committee could ever have a proper standing in the "legislative history" of an Act, it would certainly be held remote at best, and could hardly be considered determinative in interpreting the plain and unequivocal language of the statute.

But even in such "legislative history" of the Act, it is precisely clear that Congress intended to preserve independent competition and to prevent discriminations by conference lines against shippers.[43] Conferences

[43] The legitimate purpose of any conference agreement cannot extend beyond the "controlling, regulating, preventing, or destroying" of competition as among the conference members themselves. The suggestion in the Board and Conference Briefs that these words

were allowed to exist, pursuant to section 15 of the Act, only as a matter of privilege, not of right, and their activities were intended to be subject to the closest scrutiny and to all statutory proscriptions in the Act. Congress clearly prohibited in principle the exclusive-patronage system, which has the primary purpose of eliminating and suppressing *independent* competition. In this respect, it specifically prohibited all such exclusive tying arrangements or unfair monopolistic practices *then in use* by conferences—and the only reason that the present type of exclusive-patronage system was not specifically condemned was that it was not then in use. *But even if the system had been in use, the Board and Conference would have nothing to rely upon.* The present exclusive-patronage system is similar in all essential respects to the specifically outlawed exclusive-patronage-deferred-rebate system which *was* then in use.

In *Swayne & Hoyt* v. *United States*, 300 U.S. 297, 306, 307 (1937), this Court stated that,

> "As the Secretary has interpreted the evidence, the operation of the contract system [exclusive-patronage system], in the circumstances of this

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may contemplate the permissible destruction of non-conference competition by the Conference members is an absurdity. The entire legislative policy of the Shipping Act is contrary to such an approach—it is intended to preserve competition and to prevent discriminations and unfair practices. Even if the general legislative policy were in accord with the Board's approach, which it clearly is not, immunity for the exclusive-patronage system from the application of the Sherman Anti-Trust Act could not be implied by reference to general legislative policy, or to asserted inconsistencies in the statute, but would have to be expressly granted (See *supra*, p. 91).

case, does not differ substantially from that of 'deferred rebates' outlawed in both foreign and coastwise shipping by Section 14 of the Shipping Act."

1. *The Initial Report of the Alexander Committee is Contrary to Petitioners' Contentions*

As stated above, the first three volumes of the Initial Report of the Alexander Committee and more than one-half of the fourth constitute merely a summary of the testimony and contentions of the witnesses (See 53 Cong. Rec, 8095). The latter part of the fourth volume contains a summary of the arguments which were presented to the Committee.[44] This preliminary or initial Report of the Alexander Committee does not contain any proposed draft of legislation for a shipping bill.

The Committee had made certain recommendations at the end of this preliminary Report, which have been traditionally ignored by the Board and the Conference.[45] The Committee expressed concern over various unfair methods then used by conference lines "to meet the competition of non-conference lines" (p. 417). There is contained in these specific recommendations not the slightest hint that the Committee approved any exclusive-patronage arrangements with shippers, whether the rebate involved be *de*ferred or *pre*ferred.

[44] Volume 4 contains 424 pages, and the Summary begins at page 281 and continues through page 415.

[45] These specific recommendations comprise nine pages out of about two thousand pages in the four volumes and they are the only recommendations of the Committee in its Report.

as is the case of the present substitute for the deferred rebate system. In this respect, the Committee, in fact expressly condemned such practices, in the following explicit recommendation for legislation (p. 421):

> "*That rebating of freight rates to shippers be made illegal;* and that; with due regard to the proper loading of the vessel and the tonnage available, *discrimination* between shippers, or ports in the matter of rates and space accommodations be prohibited. In this connection it is the belief of the committee that water carriers should be required to charge equal rates to all shippers irrespective of the volume of freight offered for shipment."

This is an actual recommendation of the Committee not arguments presented to it. In the face of its specific recommendation that "rebating of freight rates to shippers be made illegal," how could the Committee have given any "implied congressional endorsement" to the exclusive-patronage system now before this Court, as the Board's Brief suggests (Bd. Br., p. 12)? The suggestion is preposterous on two counts: first, the system was not then in use, as we shall prove below and as the Court of Appeals has already found; and, secondly, the language relied on by the Board for such "implied approval" was merely an *argument* made to the Committee.

The Court of Appeals below has specifically rejected this "implied approval" argument of the Board and the Conference. Judge Washington, in dismissing this argument, stated:

"Were the premise sound, the argument would have some merit. But the fact is that contracts examined by the Alexander Committee were materially different from the contracts before us now." (R. 251).

Shortly before the Alexander Committee's investigation, the conferences had become concerned over the illegality of the deferred-rebate system, and such rebates were abandoned in some trades, especially in the export trades of the United States (p. 288). Apparently, as the deferred rebate system was abandoned, the system was replaced by simple contracts of carriage, specimens of which are contained in Volume One of the Committee's Report (pp. 97, 248, 249, 251, 258). These contracts were not at all like the deferred-rebate system, or its modern counterpart, the *pre*ferred-rebate system. The limited contracts of carriage before the Alexander Committee were fully described in the opinion of Judge Washington, and by the Court below as follows:

"The 1913 contracts were bona fide requirements contracts. The sellers (carriers) undertook a firm obligation to provide space; both parties undertook firm obligations as to the price. And since the price was fixed for the term of the contract (usually 6 months), the price figure in the contract represented a hedge on the part of both parties against fluctuations in rates. In the contracts in suit the carriers' commitments as to space is almost illusory, being a commitment to carry "so far as regular services are available." The price aspect

> of the contract is in terms subject to increases. Thus, the two principal considerations normally given to a buyer (the shipper) under a requirements contract—guarantee of supply and guarantee of no rate increase—are lacking. In their stead are two essentially penal provisions—the higher rate and the liquidated damage clause—both imposed to coerce shippers to refrain from using non-Conference carriers. These differences are dispositive of the Board's principal argument. Implied Congressional approval of a bona fide requirements contract is no basis for exempting the contracts in this case from the plain meaning of "discriminating or unfair methods." They must therefore be condemned." (R. 247, 248).

It was apparently *argued* to the Committee that these "requirements" contracts were not as objectionable as the deferred-rebate system.[16] Herein lies the key to the Board's distortion of the Committee Report and to its erroneous repetition of the argument in a footnote by this Court in the *Swayne & Hoyt* case. Under the heading "Advantages of Shipping Conferences and Agreements in the American Foreign Trade" (p. 295), the Alexander Committee Report summarized various *arguments* made to it. The summary was not represented as the *Committee's* views, and, in fact, it is specifically stated in a footnote that:

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[16] Even as to these "requirements" contracts there is is not even the slightest hint of approbation by the Committee.

"This summary represents the views of leading exporting and importing firms operating at our most important ports." (p. 295).

It is emphasized throughout that these were the *arguments* "presented to the Committee" (*Ibid.*).

In a similar fashion, the Committee summarized the "Disadvantages of Shipping Conferences and Agreements, as Now Conducted" (p. 304). One of the objections listed, concerned the deferred-rebate system, which was argued to be objectionable because it tied "the merchant to a group of lines for successive periods." (p. 307). The Committee went on in its summary of this argument to state that:

> "In this connection, *it is argued* that the ordinary contract system does not place the shipper in the position of continual dependence that results from the deferred rebate system." (p. 307).

The Board repeatedly throughout its Brief—as it did in the Court below—undertakes the deliberate deception, of omitting from the above quotation, the words "*it is argued*" (Bd. Br., pp. 12, 13, 40, 41). It is astounding that any administrative agency would indulge in such palpable attempts to pervert language in a Committee Report by omitting words, which omission changes the intention of the statements therein contained. As an example of such deception, repeated throughout the Board's Brief, it is stated on page 21 thereof:

> "Unlike the deferred rebate system, *said the Committee*, 'the ordinary contract system does not

place the shipper in the position of continual dependence that results from the deferred rebate system'."

The Committee, of course, *said no such thing*. In a summary of the testimony offered, the Committee had merely summarized the testimony of certain *conference* witnesses, as quoted above, and had preceded the statement referred to by the Board with the words, "In this connection, *it is argued* . . .".[47]

There can be no doubt that this language from the Alexander Report was not a recommendation of the Committee, but merely a summary of an *argument* made to it. Even if the Committee had been referring to the exclusive-patronage *pre*ferred-rebate system (which it was not, because that system was not then in use), the language could not possibly constitute an "endorsement" of such system.

2. *The Present Type of Exclusive-Patronage System was Never before the Alexander Committee*

Even if the present exclusive-patronage *pre*ferred rebate system had been before the Alexander Committee, in 1914, all of the legal argument against the validity of the system would still have to be met. The only essential difference between the *de*ferred-rebate system described by the Alexander Committee (p. 287) and the present *pre*ferred-rebate system is merely the differ-

[47] The Board itself, when not represented by its ardent regular and "Special" counsel, has been considerably more honest in describing the quotation referred to. The Board, in its Report, cites the full quotation and frankly states that it "represents the testimony of witnesses before the committee" (R. 51).

ence between a *de*ferred and a *pre*ferred rebate. Obviously, neither the Committee nor Congress would have been so naive as to condemn the former and approve the latter, at least without considerable discussion.

Until the recent unfounded assertions by the Board that the Alexander Committee gave its "implied approval" to the exclusive-patronage system (Bd. Br., p. 14), it has generally been recognized, however, that the system was *not employed* in American commerce until several years after the passage of the 1916 Act. A memorandum before the Board, dated June 16, 1926, in a proceeding known as *Ex Parte 5, Contract Rate Investigation* (subsequently dismissed on March 3, 1927, and strangely not reported) states that the exclusive-patronage-contract system was first used, in 1922, in the North Atlantic United Kingdom Freight Conference Trade, in connection only with the carriage of automobile tires. The author of this memorandum was the Chief of the Board's Bureau of Regulation and it is in the "official records" of the Board.[48] The Board's Regulation Chief, the officer normally charged with the duty to advise the Board on such matters, was obviously in a far better position, in 1926, to determine when the system was first used than the Board's present Counsel are today.

If it were true that the exclusive-patronage *pre*ferred-rebate system, as well as the *de*ferred-rebate

[48] Isbrandtsen's counsel obtained access to the above memorandum by inspecting the minutes of the Shipping Board of March 3, 1927, which are public and may be inspected by interested parties pursuant to Rule 11(e) of the Board's Rules of Practice and Procedure.

system, were in existence in 1914, during the investigation and hearings of the Alexander Committee, it is certainly very strange that there was a long hiatus after the passage of the Act, in 1916, before the system was put into effect by Conferences serving the United States and subject to section 15 of the Shipping Act.

According to the records of the Board, *furnished by the 62 conferences presently employing the exclusive-patronage preferred rebate system*, the first use of it was begun in *1923* by the North Atlantic United Kingdom Conference (now F.M.B. Agreement No. 7100) and it was applied only to *one* item, *viz.*, "automobile tires." This information supplied by the Conference conforms roughly to the facts found by the staff of the Shipping Board, in 1926, in *Ex Parte 5, Contract Rate Investigation, supra.*

Also according to these records of the Board, *furnished by the Conferences using the system*, only eight (8) other conferences initiated the system in the 1920's, viz., two (2) in 1924, two (2) in 1925, three (3) in 1927, and one (1) in 1929.

In the 1930's, thirty-four (34) Conferences started to use the system, and the balance initiated it thereafter, eleven (11) as late as 1946 and 1948. Two of the Conferences so reporting did not indicate when they first employed the system.

When the system was first concocted, *some six or seven years after the passage of the Shipping Act*, it was generally applied only to a limited number of commodities, often only one, as in the case of the North Atlantic United Kingdom Conference. In the case of the instant Japan-Atlantic and Gulf Freight Confer-

ence, its predecessor conference first used the system starting on December 31, 1928, when it was applied to only three (3) commodities, *viz.*,

"canned crabs, lily bulbs, and tea". (See R. 24)

This and other conferences have come a long way since these modest beginnings and would now assert the complete monopolistic power to apply the predatory system to "all shipments" (R. 35).

The Board's Counsel should certainly attempt to conform their extreme statements to what a simple examination of their own records would reveal. It is absolutely without foundation that they declare, on page 18 of the Board's Brief, that:

> "For 40 years the evils condemned by the Congress in 1916 have been suppressed under the Act, while the needs of ocean shipping recognized by the Congress have been preserved. For 40 years the dual rate system, now in use by 62 conferences dealing with the foreign trade of the United States, has been a cornerstone in the stability of rates and services in ocean shipping."

These statements of the Board are flatly untrue, and Isbrandtsen believes that it is fundamentally improper that it should be confronted with such outrageous factual distortions by representatives of an agency, which enters the case as an active partisan and apparently seeks to further a delusion that the general, unfounded, and incorrect assertions in its Brief are the product of administrative "expertise".

Likewise the indispensability of the system to the continuance of a conference, and the prevention of its

"dissolution", as portended by Conference Counsel herein, is subject to the same characterization, as being unfounded and untrue. In its Report, the Board states,

> "It is inconceivable that Congress in selecting a regulated conference system in preference to unregulated cutthroat competition, would have outlawed a system which in many cases is the sole method by which a conference may retain a sufficient amount of cargo to assure its continued existence. (R. 59, 60)".

Mathematical proof of the inaccuracy of such claim of indispensability and prediction of dissolution is found in the Board's records, in that, of the 125 freight conferences authorized, 63 have well "survived" without using the system. Furthermore, all conferences survived for many years after the passage of the Shipping Act without employing the system.

3. *Subsequent Legislative History After the Initial Report of the Alexander Committee Makes it Clear that any Exclusive-Patronage System is Illegal.*

After the printing of the initial Alexander Committee Report in 1914, Congress was not inactive with respect to shipping legislation. H. R. 17328 (the original shipping bill) was introduced on January 29, 1915, and hearings were held from February 10 to March 9, 1915 (53 Cong. Rec. 8074). Additional hearings were held between April 13 and 22, 1915. Various other shipping bills were introduced and considered: H. R. 18518, 63rd Cong.; H. R. 3728, 63rd Cong.; H.R. 450, 64th Cong.; H.R. 10500, 64th Cong.; H.R. 14337, 64th Cong.; H.R.

15455, 64th Cong.; H.R. 15565, 64th Cong.

Hearings were also held on H.R. 14337 before the House Committee between April 13 and 22, 1916. H.R. 15455 was the bill that eventually passed, and it was extensively debated in the House and in the Senate, where it was substantially amended. In this entire legislative history of the actual drafting of the Act there is not one single mention of any exclusive-patronage-contract system other than the deferred-rebate system.

Representative Saunders of Virginia, in explaining, on the floor of the House, the regulatory proscriptions of what is now section 14 of the Act, had no difficulty in expressing its clear meaning, which would condemn the present system (53 Cong. Rec. 8105):

> "What is the rest of that section? Not only are deferred rebates eliminated, not only are 'fighting ships' prohibited, but a carrier is forbidden to *retaliate against any shipper who refuses to use that particular line in the shipment of his freight.* Do you think that a carrier ought to be allowed to put a black mark against you, or retaliate against you, when you make your choice of another line, or ship to carry your freight?"

Senator Cummins, on the floor of the Senate, expressed great concern that *ordinary rebates "just as obnoxious to common sense and good reason" as deferred rebates might be permitted* (53 Cong. Rec. 12449). Senator Fletcher explained that such a result would not occur and quoted the remarks of Dr. Johnson, a drafter of the bill, before the House Committee on H. R. 14337.

In other words, there was a frank recognition that Congress itself could not, in specific terms, conceivably outlaw in advance all possible methods of destroying outside competition which might be devised. It trusted to the alertness of the Board and the Courts to condemn subsequent "unfair" practices which might be invented for evading the statute.

II. The Decision of the Court of Appeals Is Not in Conflict With Any Prior Decision of Any Court

Perhaps the most remarkable of the various misconceived contentions of the Petitioners are those relating to prior decisions of this and other Courts, concerning the exclusive-patronage system. Both the Board and the Conference rest their arguments on an outright perversion of what the cases have decided. Petitioners' Briefs, in this connection, both cite the same cases upon which they base their conclusions that court decisions have held "that the system is not illegal *per se*" (Bd. Br., pp. 62-69), and that "the decision below *appears* to be inconsistent with prior decisions of this Court" (Conf. Br., pp. 50-66).

Except in briefs, filed by Petitioners with the Courts, it has generally been conceded, and it is obvious from the cases, that until the decision of the Court below, there had been no definitive judicial decision on the legality or illegality of the exclusive-patronage system under the Shipping Act. For example, Chairman Clarence G. Morse of the Board frankly conceded, in his testimony before the House Merchant Marine and Fisheries Committee, on February 7, 1957 (six days after the Board's Petition herein was filed with this

Court), that until the decision of the Court below, none of the cases, involving the exclusive-patronage system that had gone to court, had been productive of any "definitive answer" concerning the legality or illegality of the system. In that testimony, the Board's Chairman engaged in the following colloquy with Representative Allen of California:

> Mr. Morse: ". . . Now, for the information of some of the members of the committee, a dual rate system is nothing more or less than an exclusive patronage contract under which a given shipper contracts with the conference that he will ship all of his shipments moving in foreign trade on vessels of the member lines of the conference. For many years the Board has consistently ruled that the dual system is lawful under the 1916 Act. The question has been raised in several court cases and in none of them with a definitive answer, in my personal opinion, but as a result of this ruling of the Board in the Japan-Atlantic conference, the matter went to the Federal Court of Appeals here in Washington and it was ruled that the system was unlawful per se.[49] Applications for certiorari to the Supreme Court were filed just last Friday, I believe, and if the Supreme Court grants the writ of certiorari, which I hope it will do, the matter will be finally determined by the Supreme Court as to whether the system is or is not lawful.
>
> Mr. Allen: "In other words, then, the courts have

[49] The decision referred to is the decision of the Court below herein.

ruled that the opinion held by Maritime over the years was not in accordance with law?

Mr. Morse: "Some courts have so held. There has been intimation by an earlier Supreme Court that the system was not unlawful per se. It was purely dictum by the Supreme Court in that early case." [30]

In agreement with the Chairman, the Board's "Special Counsel", Mr. Gardner, also regular attorney for one of the Petitioners, in a letter to the Clerk of this Court, dated October 2, 1957, requesting additional time for oral argument, states that the issues involved in the exclusive-patronage system have engaged the Board in Court cases for many years "*without yet having produced a definitive result*".

This Court will undoubtedly be surprised at Petitioner's contentions that it has previously held the exclusive-patronage system lawful, by implication, not only through a footnote in a case not involving this issue, but also through its action of remanding cases to the Board on the ground that the Board had primary jurisdiction, or because there were procedural deficiencies. The previous decisions of this Court involving the exclusive-patronage system have either involved a denial of *certiorari*, where the Court below had held

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[30] The case referred to by the Board's Chairman is *Swayne & Hoyt v. United States*, 300 U. S. 297 (1937), which is discussed *infra*, pp. 132 to 137. This language appearing in a footnote in the *Swayne & Hoyt* case to which Mr. Morse refers as "purely dictum" is cited and quoted in the Board's Brief on pages 64 and 65 as a "holding". The case is also discussed in the same terms in the Conference Brief at pages 60 through 62, as follows (p. 62):

> "We urge that this footnote constitutes a holding that dual-rate systems are not illegal under § 14, Third."

that the system involved an "agreement" between carriers, *Isbrandtsen Company* v. *United States*, 211 F.2d 51, Cert. denied sub nom., *Japan-Atlantic & Gulf Freight Conference* v. *United States*, 347 U.S. 990 (1954); or a refusal to consider the question of legality on the ground that the Board had primary jurisdiction to consider the facts, *U. S. Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474 (1931); *Far East Conference* v. *United States*, 342 U.S. 570 (1951); or a refusal to consider the question of legality on the ground that the Board had *not* made proper findings of fact to support even its own reasoning, *A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Company*, 342 U.S. 950 (1952); or an affirmance of a decision of the Maritime Agency holding that the use of the system was not justified. *Swayne & Hoyt* v. *United States*, 300 U.S. 297 (1936).

Neither the arguments of the Board nor the arguments of the Conference concerning the alleged legality of the exclusive-patronage system have ever prevailed in any case before this or any other Court. The Courts have refused to decide the issues of illegality heretofore raised by opponents of the system, primarily because of the Board's own procedural deficiencies and because of the Board's failure to exercise its primary jurisdiction. The Board's only success in these cases has been merely to have the cases remanded to it, a result it has consistently striven to accomplish.

(1) In *Isbrandtsen Company* v. *United States*, 81 F. Supp. 544 (S.D. N.Y., 1948), an injunction was granted to Isbrandtsen restraining a Board order purporting to allow the Eastbound and Westbound North

Atlantic Continental Conferences to institute the system. The injunction was conditioned upon Isbrandtsen's prosecution before the Board of a complaint. An appeal by the Conference and the Board to this Court was dismissed sub nom. *A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Company*, 336 U. S. 941 (1949).

(2) After the above decisions in that *North Atlantic Continental* case, Isbrandtsen prosecuted its complaint before the Board, which dismissed the Complaint and permitted the use of the System. Isbrandtsen thereupon appealed that decision, or contested it, before the Statutory Court, where the original complaint was still pending, and the Statutory Court held that the Board order dismissing the complaint of Isbrandtsen in that case was invalid because the differential between contract and non-contract rates was obviously arbitrary and therefore unjustly discriminatory. The Court specifically declined to decide the issue of legality in this case because of the obvious failure of the Board to make the necessary basic, pivotal, or constitutive findings to support even its own reasoning. The Board—retaining "Special Counsel" to argue before this Court, as in this case—and the Conference appealed that Statutory Court decision directly to this Court, which, by an equally divided court, affirmed the decision of the Statutory Court, *A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Company*, 342 U.S. 950 (1952).

(3) In *Far East Conference* v. *United States*, 342 U. S. 570 (1951) this Court reversed a decision of the New Jersey District Court which refused to dismiss a complaint filed by the Department of Justice against the use of the system, based upon an alleged violation of the Anti-Trust Laws, the sole ground of this Court's

reversal being that the Board had primary jurisdiction. The Board and Conferences have tried to stretch that decision, by implication, again, as authority for the proposition that the system is not illegal "*per se*" via a deduction that this Court would not have so remanded the case if the system were in fact illegal "*per se*"—a matter, of course, on which this Court never passed, even though two Justices in the *Far East* case were even opposed to sending the case back to the Board, on the ground of primary jurisdiction. In this respect, the dissenting opinion of Mr. Justice Douglas, with whom Mr. Justice Black concurred, states:

> "it would seem plain that when a shipper is charged one rate if he gives the Conference a monopoly of his business and another and higher rate if the shipper uses a carrier not a member of the Conference, the shipper is being retaliated against for shopping around among carriers" [342 U.S. at 578, 579].

After this decision by this Court, while the Department of Justice did not lodge a complaint before the Board, it intervened, on the side of the Secretary of Agriculture who brought before the Board its Docket 725, directly challenging the legality of the dual rate system. When the Board dismissed the complaint of the Secretary, he filed, in the Court of Appeals for the District of Columbia Circuit, a Petition to Review the Board's decision, which Review is now pending under the name of *Ezra Taft Benson, Secretary of Agriculture of the United States* v. *United States of America and Federal Maritime Board* (13373).

(4) In *Isbrandtsen* v. *United States*, 211 F. 2d 51 (D.C. Cir. 1954), the Court of Appeals held, in the previous proceeding in this case, that the exclusive-patronage system constituted an "agreement" or "arrangement" under Section 15 of the Act and had to be filed for approval and approved, under that section, after hearing, before it could be used by the Conference. The Board had strenuously claimed that such approval was not necessary, and that the system should be allowed to go into effect without any opportunity for even a hearing. Petitions for certiorari to this Court by the Board and by the Conference were denied, *F.M.B. et al.* v. *Isbrandtsen Company*, 345 U.S. 975 (1952). A "Petition" signed by the present Chairman of the Board, then in private law practice, to file a brief *Amicus Curiae* on behalf of several conferences in support of the legality of the system was denied by this Court.

In each of these cases to which the Board was a party, its contentions were rejected and its orders were reversed, although the Board repeatedly evaded a Court decision on the basic question of illegality. It is certainly audacious—to say the least—that the Board's Counsel should now offer the above decisions as support for their contention that the Courts have held the system not "illegal per se" (Bd. Br., pp. 63-69).

Similarly, there is no support in any of the other cases cited by the Board or by the Conference for the proposition that the system is not illegal "*per se*."

Both the Board and the Conference cite *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U.S. 474 (1931),

(commonly called the "*Cunard Case*") to establish their contention that the decision of the Court below herein is in conflict with that decision of this Court (Bd. Br., p. 63; Conf. Br., pp. 50-60). Just how the *Cunard case* could possibly establish that proposition is difficult to perceive. That case was a suit by a private steamship company, under the Sherman Anti-Trust Act, 15 U.S.C. §§ 1-7, and the Clayton Act, 15 U.S.C. §§ 12-27, against a group of steamship lines using the exclusive-patronage system. It was held by this Court that a private party could not entertain the suit for injunctive relief under section 16 of the Clayton Act, 15 U.S.C. § 26, because the Shipping Board had primary jurisdiction over the factual subject matter of the complaint, under the Shipping Act. Nowhere in the opinion of either this Court or the Court of Appeals therein is there the slightest indication of a holding that the system was "not illegal *per se*", for that issue was not decided. Incidentally, the independent carrier in the *Cunard Case*, U. S. Navigation Company, is now a member of the North Atlantic Continental Freight Conference, which was therein involved, which conference *now uses* the exclusive-patronage system.

The complete absurdity of the Board and Conference position is most fully apparent, however, in their strained analysis of the case of *Swayne & Hoyt v. United States*, 300 U.S. 297 (1936). *The Board and the Conference virtually rest their case here upon language appearing in a footnote to this decision*, which language was merely a repetition of an uncontested "*argument*" made by the parties in that case to this

Court, which was irrelevant to any issue raised in the proceeding (Bd. Br., p. 65; Conf. Br., p. 61). On the basis of the reasoning of the Board and of the Conference, it is the first time in American jurisprudence that a footnote, attached to a judicial opinion, relating to an issue not raised in the case, is offered as the major part, or any effective portion, for that matter, of the Court's decision.

The *Swayne & Hoyt* case was an appeal by a Conference of a decision, by the Shipping Board Bureau (the then administrator of the Shipping Act) in *Gulf Intercoastal Contract Rates,* 1 U.S.S.B. 524 (1936), holding that the exclusive-patronage system was not justified and was unduly prejudicial in violation of section 16 of the Act [when used in the intercoastal trade]. The question of the illegality of the system as such was not pressed by either party to the appeal. The Conference therein, the appellant, argued that the system must be approved, and the Secretary of Commerce, representing the Shipping Board Bureau, sought merely to justify his decision on the facts in that case. There was, therefore, no "case or controversy" before this Court concerning *the basic illegality* of the system under any section of the Shipping Act, much less under any other statute or under the Constitution. The Court was necessarily limited to the issues before it, which concerned the sufficiency of the evidence, and any further expression would have at most constituted some sort of advisory opinion.

In the review of the agency decision in the *Swayne & Hoyt* case, both the Statutory District Court [18 F. Supp. 25 (1936)] and this Court [300 U.S. 297 (1937)]

held that the Secretary of Commerce was justified in holding that the system was unjustly discriminatory. The fact that there was no actual case or controversy before the Court on the fundamental illegality of the system *per se*, and, therefore no arguments presented to the Court alleging such illegality, accounts for the footnote on page 307 of this Court's opinion, which has been quoted, as creed, in every recent Conference and Board brief.[51] As explained above, the footnote contains certain incorrect conclusions conjured from the Alexander Committee Report, t the effect that "the Committee did not condemn the contract system completely." The footnote goes on to say, however, that:

> "The policy of the statute may be properly applied where, as in the circumstances of this case, the contract system must be taken as actually operating to effect a monopoly. Cf. *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.*, 1 U.S.S.B. 41."

If this footnote constituted "a holding", as Conference Counsel astoundingly asserts (Conf. Br., p. 62), it would be ample reason for the basic *il*legality of the present system. The Board has frankly admitted that the unmitigated purpose of the system is to secure a

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[51] The Court of Appeals, herein, below has commented upon this much inflated footnote, in *Swayne & Hoyt* case, as follows:

"It is urged that footnote 3 of the Court's opinion in *Swayne & Hoyt* is some authority for exempting the contracts in this case from Section 14, Third. There are two answers to this argument. First, the Court was there concerned not with a recommendation of the Alexander Committee but with an *argument* that had been addressed to the Committee. See H.R. Doc. No. 805, 63rd Cong., 2d Sess. 307 (1914)." (R. 264)

complete monopoly (See Supra, pp. 78, 79). Therefore, "the policy of the statute may properly be applied where, as in the circumstances of this case, the contract system must be taken as actually operating to effect a monopoly."

The *Swayne & Hoyt* case presented a most unusual situation, for there was no party to the case raising the question of the fundamental illegality of the system. The Board and the Conference here admit that the Secretary of Commerce did not assert such a position. The Board's present Report points out that the agency decision, from which appeal was taken in the *Swayne & Hoyt* case, had stated that (R. 44):

> "Whether any such dual rate system (in foreign commerce) is lawful is a question which must be determined by the facts in each case."

Such was, obviously, the argument that was presented to the Court by the Secretary of Commerce, as Respondent. It is not surprising, therefore, that the Court, under such circumstances, did not hold the system illegal "*per se*", for it would have been deciding a question on its own initiative that was neither raised, argued, nor briefed. The Court, confronted with this unusual situation, did no more than repeat the analysis made by the Shipping Board Bureau. Even if the Court had reversed the Shipping Board Bureau, it would not have constituted a holding in favor of the legality of the system, because the legality of the system just was not an issue in that case, either before the Court or the administrative agency. "Unjust discrimination" under Section 16 of the Shipping Act was the issue.

Neither Section 14, Third, nor any other section of the Shipping Act was involved in the *Swayne & Hoyt* case. The proscription of Section 16 is analogous to that of Section 3 of the Interstate Commerce Act. But the basic illegality of the system *was not in issue under even that section 16*—only the agency's factual determinations were in issue. The far more serious questions of illegality under Sections 14, 15 and 17 of the Shipping Act, and under the Anti-Trust Laws (because the system involves parties not subject to the Shipping Act), and the Constitutional issue were in no way raised in the *Swayne & Hoyt* case and had never been decided by any Court, prior to the instant decision of the Court of Appeals below, herein. The latter two questions concerning the involvement of shippers, who are not "persons" covered by the Act, and the constitutional questions were raised for the first time in this case, but not passed upon by the Court below, because the Court held the system illegal, under Section 14, Third.

The Conference in its Brief seems to urge that there was a case of controversy before this Court in the *Swayne & Hoyt* case on the ground that the District Court had held the system illegal "*per se*" under section *16* of the Shipping Act (Conf. Br., p. 60). It is certainly not clear that the District Court considered it was doing more than sustaining the Agency's decision, because the case arose under section 16 of the Act. Even if the Conference argument were valid, however, there is no support for Petitioners' argument of legality "*per se*", based on the decision of this Court in the *Swayne & Hoyt Case*, because this Court *affirmed* the decree of the District Court.

In any event, however, there was no case or controversy between any of the parties to the *Swayne & Hoyt* Case concerning the legality of the system, before either this Court or the Statutory District Court, and no one presented arguments on the illegality of the system. Moreover, the case arose under Section 16 of the Shipping Act, and it is impossible to make even a logical transition in the Conference argument which reaches the conclusion that this Court's footnote in the *Swayne & Hoyt Case*, "constitutes a holding that dual-rate systems are not illegal *per se under § 14, Third.*" Section 14, Third is not even mentioned in either the opinion of this Court or in the opinion of the District Court and there is absolutely no discussion whatsoever concerning its provisions. The only mention of section 14 appears in the footnote with reference to *deferred*-rebate systems under Section 14, *First*.

This analysis of the above-cases is fully confirmed by the Court of Appeals below. Judge Fahy, in this respect, stated the opinion of the Court as follows:

> "We are aware that the dual-rate system has not been held by any judicial decision to be invalid under section 14, Third; that is, without regard to the reasonableness or justness of the discrimination inherent in the system. We have already referred to *Swayne & Hoyt, Ltd.* v. *United States*, *supra*, which, though it upheld the Board in condemning the dual-rate system there involved, did not rest upon section 14, Third. In *Far East Conference* v. *United States*, 342 U.S. 570, the court, adhering to principles previously laid down in

United States Navigation Co. v. *Cunard Steamship Co.*, 284 U.S. 474, required the District Court to dismiss a suit of the United States which attacked the dual-rate system as violative of the Sherman Act without the particular system having been passed upon initially by the Board. And in *A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Co.*, 342 U.S. 950, the court by an equally divided vote affirmed *Isbrandtsen* v. *United States*, 96 F. Supp. 883, which had invalidated the dual-rate system there involved, not under Section 14, Third, but because the spread between the two rates was found to be arbitrary. . . ." (R. 244).

The understanding of the Court below concerning the above decisions of this Court is in conformity with every other case or authority that has ever commented on the subject. In *United States* v. *Alaska S. S. Co.*, 110 F. Supp. 104 (W.D. Wash., 1952), the District Court held that it had no jurisdiction to consider an injunction sought by the Department of Justice to enjoin an alleged conspiracy of a steamship company and its officers to prevent and to eliminate competition. The injunction was brought under the Sherman Act, but the Court held that the Maritime Board had primary jurisdiction to determine the facts. In its decision, the Court analyzed *United States Navigation Company* v. *Cunard, supra; Swayne & Hoyt* v. *United States, supra;* and *Far East Conference* v. *United States, supra*, and considered that each case supported the principle that the Board had primary jurisdiction.

At page 69 of its Brief, the Board advances the following unprecedented "legal" argument:

"It seems plain that if the system were illegal *per se*, as has been urged in each of the above cases, the outcome would long since been outright condemnation of the system."

The above comment of Board's Counsel shows very little appreciation or understanding of our system of jurisprudence or for the requirement that there must be a "case or controversy", and that a party must first fully exhaust his administrative remedies. The Courts of the United States do not render advisory opinions, nor do they decide issues presented until these basic requirements have been met. In applying the primary jurisdiction rule, the courts have taken the definite position that it makes no difference that the actions alleged would be ultimately held to be unlawful, if proven, and that they could not be approved by the Board. The allegations in the *Alaska S. S. Co.* Case, *supra*, set forth actions that would clearly have been in violation of the Anti-Trust Laws. It has similarly been held that a steamship owner could not maintain a suit to enjoin a competitor from operating proposed "*fighting ships*" at unreasonably low rates so as to ruin the plaintiff's business, because the question involved was within the exclusive primary jurisdiction of the Maritime Board. *Wisconsin & Michigan Transp. Co. v. Pere Marquette Line Steamers*, 67 F. 2d 937 (C.A. Wis., 1933). Certainly, the Board could not suggest that the action of the Court in sending the case to the Board gave rise to the implication that "fighting ships" could be approved as lawful "*per se*".

In view of the status of the cases before the Courts, it will undoubtedly come as a great surprise to this

Court that the Board would dare to assert that there has been even an implicit or tacit ruling on the legality "*per se*" of the exclusive-patronage system by this or any other Court, prior to the decision of the Court below.

Alleged approval and endorsement by "implication" or failure to "condemn" runs throughout the briefs of the Board and the Conference—straws they grasp at, because there is nothing of any substance to hang on to. All of their arguments can be boiled down to two *deductions by "implication", viz.*, that the dual rate system is lawful "*per se*" because neither the Alexander Committee nor the Courts have specifically "condemned" it. Those two weak reeds are absolutely all on which they can even lean.

III. The Board's Administration of the Statute Has Been Anything But Consistent

It must be with certain misgivings that Board and Conference Counsel advance the arguments that the Board decisions concerning the exclusive-patronage system have been "consistent" and are entitled to weight (Bd. Br. p. 69; Conf. Br., p. 67). We see little point in analyzing these decisions at great length, since they have already been touched upon in other parts of this brief. The Statutory District Court, in *Isbrandtsen Company* v. *United States*, 96 F. Supp. 883, 890 (S.D. N.Y. 1951), made the following comment concerning these Board decisions:

> . . . "the decisions of the Board (none of which approving a dual-rate provision has heretofore come to court) have lacked uniformity and consistency;

and, in such circumstances, administrative interpretations have little weight." (footnotes omitted)

Prior to *Pacific Coast European Conference*, 3 U.S. M.C. 11 (1948), the issue of the legality of the system directly under Section 14, Third had not been met, so that there had been no administrative decision analyzing the point. Since the time of the *Pacific Coast European* case, the question of the legality of the system has been in continual litigation before the Board and the Courts, in an attempt by the Departments of Justice and Agriculture, as well as Isbrandtsen, to obtain a definitive Court decision. Although the complaint in *Rawleigh v. Stoomvaart*, 1 U.S.S.B. 285, 288 (1933) had alleged violations of Sections 14, 16, and 17 of the Shipping Act, it had alleged "*unjust* discrimination", and there was consequently no analysis of the provisions of Section 14, Third, or of any other section of the Shipping Act in that case. Certainly, therefore, there has been no long-standing and consistent administrative determination of Section 14, Third prior to the time the issue was presented to the Courts starting in 1948 and thereafter, for there was no Agency decision on the point at all.

Before 1927, the Board's predecessor, the United States Shipping Board, had held the system illegal under *Sections 16 and 17 of the Act*. *Eden Mining Co. v. Bluefields Fruit & S. S. Co.*, 1 U.S.S.B. 41 (1922). After the case of *Rawleigh v. Stoomvaart*, *supra*, it is true that the Board and its predecessors have on a variety of theories held the system lawful *per se*, although the principles and rules established in one case have seldom been followed in the next. The so-called "principles" which the Board's Counsel

allege these cases have established (Bd. Br., pp. 72, 73) are entirely refuted by the fact that some fifty-seven conferences are now using the exclusive-patronage system without being confronted with any independent competition.

The pre-World War II opinions of the Board's predecessors—written when the agency was considerably closer in point of time than the present Board to the Congressional objectives and to the Congresional response of public indignation which led to the passage of the Shipping Act of 1916—at least give formal recognition to the proscriptions against "unjust discrimination" existing in the Act, although such recognition by the Board has become less discernible as the years have passed, and the steamship monopolies have become more openly defiant of any regulatory authority.[52]

The earliest case to arise before the Shipping Board, involving the system of exclusive-patronage, was *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.*, 1 U.S.S.B. 41 (1922). In that case the Shipping Board held that the practice of a common carrier charging higher rates to non-contract shippers than to contract shippers, who had agreed to patronize the carrier exclusively, was unjustly discriminatory in *violation of sections 16 and 17* of the Shipping Act. In this respect the Shipping Board held at pages 45 and 46 of its Report:

[52] The Monograph of the Attorney General's Committee on Administrative Procedure on the Maritime Commission, written in 1940, stated, on page 1, the conclusion that has been traditionally applicable to the Board's regulatory activity: "Despite the comprehensive regulatory powers conferred upon the Shipping Board by the act of 1916, the Board . . . throughout its existence failed to interest itself in the vigorous exercise of those powers."

"It is evident that the purpose of Congress in enacting these provisions [Sections 16 and 17 of the Shipping Act] of the statute was to impose upon common carriers within the purview thereof the *duty of charging uniform rates to all shippers receiving similar transportation service.* The duty of the respondent under these sections was to serve the public impartially, and we think the language used in the *W. U. Tel. Co.* v. *Call Pub. Co.* 181 U.S. 92, in dealing with a similar statute, is entirely applicable to the case in hand. The court there said: 'All individuals have equal rights both in respect to services and charges. Of course such equality of rights does not prevent differences in the modes and kinds of service and different charges based thereon. But that principle of equality does forbid any difference in charge which is not based upon difference in service, and even when based upon difference of service must have some reasonable relation to the amount of difference and can not be so great as to produce an unjust discrimination.' From the facts of record in the case before us it is manifest that the transportation service furnished the complainants and contract shipers was in all respects identical.

"It is suggested on behalf of the carrier that as the complainants were extended full opportunity to avail themselves of the lower rates by agreeing to the same condition which contract shippers had accepted, they were accorded the substantial equality of treatment contemplated by sections 16 and 17 of the act. This contention, how-

ever, is as unconvincing here as when used in support of other kinds of unjust discrimination resulting from unfair conditions imposed by carriers upon shippers. *Under the statute, the complainants, as members of the shipping public, were entitled to have their shipments carried at the same rates as other patrons who received identical service. This right attached to each individual transportation transaction as such, and was not to be predicated upon any condition imposed by the respondent restricting the complainants' freedom of choice as to what carrier or carriers they should elect to patronize in connection with subsequent shipments.*"

In the second paragraph quoted above, the Shipping Board held that it was no answer to this "unjust discrimination" that the shipper refusing to sign the exclusive-patronage contract had an opportunity to do so, and thereby get the lower rates, if he so chose. This alleged "freedom" of all shippers to sign has been repeatedly advanced by the Board and conferences as a complete defense against any claim of "unjust discrimination". It belongs in the same category as that other "freedom", constantly reiterated by the Board and the Conferences, *viz.*, that Isbrandtsen and other independents have the complete "freedom" to join the conference, when they can no longer withstand the conference practices, including the exclusive-patronage system. Of course, we should point out, the independents have another "freedom", which was explained by

Board Counsel, to the Statutory District Court, in *Isbrandtsen v. United States, supra* (see *supra*, page 78), *viz.*, "to go out of business".

The Shipping Board, in the *Eden* case, held that the facts before it involving the exclusive-patronage system were "analogous" to those involved in *Menacho et al.* v. *Ward*, 27 Fed. 529 (C.C.S.D.N.Y., 1886). The Board stated that the *Menacho* case pronounced the *common-law doctrine* that such exclusive-patronage system was unlawful. The clear principles announced by the Shipping Board in the *Eden* case have long since been lost sight of and have been "qualified" away by subsequent agency decisions.

After the decision of the Shipping Board in the *Eden case*, the Board in 1926 instituted an investigation into existing exclusive-patronage contract systems. This case, which received the title, *Ex Parte 5, Contract Rate Investigations*, was subsequently dismissed by the Board in 1927 under rather mysterious circumstances and was never reported. A Report is usual even when a case is dismissed by an administrative agency.

The condemnation by the Shipping Board of the exclusive-patronage-contract system in the *Eden* case was thereafter followed by the Shipping Board Bureau in *Intercoastal Investigation, 1935*, 1 U.S.S.B.B. 400, 451, 452 (1935), where it was held:

> "An underlying purpose of the shipping Act, 1916, is to prevent every form of favoritism based upon the relations of the shipper with the carrier as a customer and to place all shippers, the large

and small, the steady and occasional, upon a plane of equality in the right to service. For this reason that act condemns and makes unlawful every regulation, device, or subterfuge which undertakes to give to anyone an advantage based upon conditions other than those inhering in the transportation itself and alone. Contracts of the character in question do not constitute a transportation condition as to warrant a difference in transportation rates. Furthermore carriers are not justified in attempting to restrict traffic to move over their lines."

Also, to the same effect, as the holding in the *Intercoastal Investigation* case, was the decision of the same Shipping Board Bureau in Gulf *Intercoastal Contract Rates*, 1 U.S.S.B.B. 524 (1936), which was later *affirmed* by the Supreme Court, in *Swayne & Hoyt* v. *United States, supra;* the latter case being greatly relied upon in the Board's present Report, where selected language (certainly not more than dicta) is extracted from the Court's opinion, although the language selected was unnecessary to the decision and irrelevant to it.

The last administrative decision involving the exclusive-patronage system prior to the Second World War, was *Contract Routing Restrictions*, 2 U.S.M.C. 200 (1939), where the Maritime Commission, relying on the above-mentioned decisions of its predecessors, stated as follows:

> "Since they carry more than 80 percent of the traffic from the Great Lakes Area, it is obvious that respondents, for all practical purposes have a monopoly. A difference in rates for identical services based solely upon whether or not the carrier secures the shipper's entire patronage is prima facie discriminatory.

As the *Contract Routing* case demonstrated, the criterion employed by the Board's predecessors in outlawing the system was not the nature of the commerce, whether foreign or intercoastal, but the monopolistic nature of the system. Significantly, the Commission held that carrying more than 80 per cent of the trade would amount to a monopoly, which is to be contrasted with the Board's present view which concedes that the Conference here will get at least 90 per cent of the cargo. The Commission also stated that it had been held in *Rawleigh* v. *Stoomvaart, et al.*, 1 U.S.S.B.B. 285 (1933) that special rates may be granted in foreign commerce "when based upon regularity of consignments, number of shipments or quantity of merchandise furnished for transportation . . ." This, however, is not the question involved in the system now before this Court, for the contract rates are available to all shippers who would agree to patronize conference carriers exclusively, whether they might have a shipment every week or one every ten years, and irrespetive of any volume.

These principles, announced in the pre-World War II decisions of the Board's predecessors, although largely inconsistent with one another, are certainly

vastly different from the new "principles" which the Maritime agencies have announced since 1948, during which recent period the legality of the system has, for the first time, been actively and diligently questioned.

IV. The Exclusive-Patronage System Is Fundamentally Unlawful for Various Reasons Other Than the Violation of Section 14, Third.

In addition to the basic and unavoidable illegality of the exclusive-patronage system under Section 14, Third of the Shipping Act, as the Court of Appeals has held, the system is fundamentally unlawful for various other reasons. These other issues, while submitted, were not met in the decision of the Court below, and it was unnecessary for the Court to meet them, in view of its holding that the system is unlawful under Section 14, Third. The additional obstacles which the exclusive-patronage system would have to overcome, in order to be rendered legal, are of substantial importance, and constitute further cogent reasons why the Judgment of the Court Below Should Be Affirmed.

The exclusive-patronage system is also fundamentally unlawful for at least the following reasons:

First, it is unjustly discriminatory and unduly prejudicial in contravention of sections 15, 16 and 17 of the Shipping Act.

Secondly, the Board could never have any discretion or authority to approve the exclusive-patronage system because it involves as its main and most essential ingredient an exclusive-patronage contract to be entered into between common carriers and shippers, the latter parties not being "persons" subject to the Ship-

ping Act nor consequently capable of receiving any immunity from the Anti-Trust Laws, under section 15 of the Shipping Act.

Thirdly, the Board's interpretation of the Shipping Act would render section 15 of the Act unconstitutional, and consequently invalid, as an improper delegation of legislative powers and because it would deprive Isbrandtsen and other carriers of property without due process of law.

A. The Exclusive-Patronage System Is Unjustly Discriminatory

The system is also necessarily and fatally illegal because it is unduly prejudicial and unjustly discriminatory in violation of sections 15, 16, and 17 of the Act. These are terms which have had a long and settled construction in Anglo-American transportation law—which construction it was necessary for the Board to disregard, in order to reach its preconceived conclusion that the system is not illegal.

Sections 15 and 17 of the Act, prohibit, *inter alia*, common carriers from charging rates that are "unjustly discriminatory", or unfair or unjustly prejudicial.

Section 16 of the Act prohibits, *inter alia*, such carriers from giving any shipper any undue or unreasonable preferences or advantage in any respect whatsoever.

Section 17 of the Shipping Act in this respect has its immediate origin in and bears close resemblance to section 2 of the Interstate Commerce Act, 49 U.S.C.

sec. 2,[53] which section was in turn derived from the so-called equality clause of the English Railway Clauses Consolidation Act of 1845.[54]

Section 16 of the Shipping Act—as the Board admits (R. 55)—was patterned after section 3(1) of the Interstate Commerce Act, 49 U.S.C. sec. 3(1), which in turn was adopted from section 2 of the English Railway and Canal Traffic Act of 1854.[55]

It is undisputed that the Alexander Committee in drafting the Shipping Act relied heavily on the previous regulatory experience of the Interstate Commerce Commission.[56] In the light of this legislative history, various cases have held that it was the intention of Congress that the settled construction of the earlier Interstate Commerce Act must be applied to the Shipping Act, unless in particular instances something peculiar in the question under consideration, or

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[53] The legislative history of the Shipping Act is decisive that Congress intended that two shippers identically situated should not be obliged to pay different rates for the same transportation service. There is no doubt that the unjust discrimination proscription in section 17 of the Shipping Act was intended to apply the explicit proscription contained in section 2 of the Interstate Commerce Act of 1887. See House Hearings on H.R. 14337, 64th Cong., pp. 28-29, 31-32, 40, 84, 88-89, 110, 127, 139; Senate Hearings on H.R. 15455, pp. 146, 242, 243, 249, 250.

[54] See *Texas & Pac. R. Co. v. Interstate Commerce Commission*, 162 U.S. 197, 222 (1896).

[55] See *Interstate Commerce Commission* v. *B. & O. R. Co.*, 145 U.S. 263 (1892) *Texas, etc. R. Co.* v. *Interstate Commerce Commission*, *supra*.

[56] The Committee studied the "decisions and files of the Interstate Commerce Commission." H.R. Doc. 805, 63rd Cong., 2nd Sess. (1914), p. 4. It furthermore hired as consultants two experts on railway transportation, Professors Huebner and Johnson of the University of Pennsylvania, who participated in the drafting of the bills.

dissimilarity in terms of the Acts, requires a different construction. *Inter-Island Steam Nav. Co. v. Territory of Hawaii*, 305 U.S. 306 (1938); *United States Navigation Co. v. Cunard Co.*, 284 U.S. 474 (1931 supra); *Prince Line* v. *American Paper Exports, Inc.*, 55 F. 2d 1053 (1932).

There has never been a judicial decision under the Shipping Act, the Interstate Commerce Act, or under any other transportation act, which has held a discrimination in rates to be justified, where two different rates were charged for identical transportation services to similarly situated shippers. Despite the Board's attempt to avoid facing the problem, the exclusive-patronage system involves an admitted situation—which no one can escape—that of a common carrier, obligated to take all cargo offered, charging two different rates, for the identical transportation services—volumes even being identical—to two similarly situated shippers, from the same point of origin to the same destination, —and even on the same ship—the higher rate being charged in retaliation for the shipper's refusal to give the carrier its exclusive patronage and his refusal to boycott other carriers.

It is well settled that a discrimination in rates by a common carrier can only be "justified by the cost of the respective services, by their values, or by other transportation conditions." *United States* v. *Illinois Central R. Co.*, 263 U.S. 515 (1924). The decisions are unanimous—with no authority to the contrary—that different rates for identical transportation services result in unjust discrimination. *Wight* v. *United States*, 167 U.S. 512 (1897); *Louisville & Nashville*

Railroad Co. v. *Mottley*, 219 U.S. 467 (1911); *Chicago, Ind. and L. Ry. Co.* v. *United States*, 219 U.S. 486 (1911); *I.C.C.* v. *Delaware, L. & W. Railroad*, 220 U.S. 235 (1911); *I.C.C.* v. *B. & O. Railroad*, 225 U.S. 326 (1912); *Fourche Lumber Co.* v. *Bryant Lumber Co.*, 230 U.S. 316 (1913); *Seaboard Air Line Ry. Co.* v. *United States*, 254 U.S. 57 (1920).[37]

In its hopeless groping for analogies—there being none—the Board, without citing or attempting to distinguish any of the above cases, has hit upon situations which are entirely irrelevant to the factual circumstances of this case. Thus the Board cites in its Report three cases—none now cited to this Court—*Eastern Central Motor Carriers Ass'n.* v. *United States*, 321 U.S. 194 (1944); *Texas and Pacific Ry.* v. *United States*, 289 U.S. 627 (1933); *I.C.C.* v. *Alabama-Midland Ry.* 168 U.S. 144 (1897), for the proposition that "carrier competition has been considered a factor to be weighed in justification of a prima facie discrimination or preference" (R. 55). These cases all arose under section 3(1) of the Interstate Commerce Act and concern the charge of unreasonable preference or advantage. None of the cases involves the charging of different rates by a common carrier for the same transportation service. Obviously, competition may be a

[37] The cases at common law are in accord with this principle. In *Messenger* v. *Pennsylvania Railroad Co.*, 7 Vroom (36 N.J.L.) 407, 410 (1873), aff'd 8 Vroom (37 N.J.L.) 531 (1874), the Court said: "Recognizing this as settled doctrine, I am not able to see how it can be admissible for a common carrier to demand a different hire from various persons for an identical kind of service, under identical conditions." See also *Menacho* v. *Ward*, 27 Fed. 529, 533 (C.C.N.Y. 1886).

factor in justifying a preference where different transportation services are involved. Thus a *motor* carrier may be justified in granting a volume discount in order to make its rates competitive with *railroad* rates, which was the situation in *Eastern Central Motor Carriers Ass'n.* v. *United States, supra.* Similarly, where a carrier is offering a service to City C from both Cities A and B, it may be justified in offering a lower rate from A to C than from B to C, notwithstanding the fact that the distance from A to C may be the same or longer than the distance from B to C, because the carrier encounters competition from other carriers at the former points but not at the latter. *Texas and Pacific Ry.* v. *United States, supra; I.C.C.* v. *Alabama-Midland Ry. Co., supra.* The Board has never—and will never—find a case,[58] however, holding that competition justified a common carrier in charging discriminatory rates for *identical transportation services* in the same form of transportation—water, for instance—for shippers, similarly situated at the same point of origin, under identical circumstances and conditions of carriage.

Similarly, the Board in its persistent groping for some justification of its unprecedented position, however flimsy, hits upon the "volume discount", which it considers "highly analogous" (R. 56). The Court of Appeals below has held that the present exclusive patronage contracts are not "requirements" contracts, see supra pages 45 and 46. Admittedly "requirements" contracts may have legitimate utility when based upon

[58] Other than its own.

bona fide considerations of cost and value of the services rendered. Cf. *Standard Oil of Cal.* v. *United States*, 337 U.S. 293, 306 (1949). *It is by no means clear that even requirements contracts could be legal under the Shipping Act.* The Board and the Conferences formerly proffered round-trip and commutation tickets as analogies, but, of course, there is no exclusive-patronage contract involved in these dealings. Significantly the Board cites no court decisions to support its unfounded and perverted theory. Moreover, it had found in this very case that:

> "There would, under the dual rate system, be no difference in the cost or value of service rendered to two shippers, one of which is a contract signatory and the other of which is not a contract signatory, although the cargoes might be identical and identically destined." (R. 55).

The exclusive-patronage system has no relation to volume of cargo, as the Board's Report admits (R. 56). The "contract shipper" does not agree to ship any cargo whatsoever—the contract shipper of one ton of cargo would receive the same contract rate as the contract shipper of 100,000 tons, while the non-signing shipper of 100,000 tons would pay the higher non-contract rate on every ton. Furthermore, Section 14, Fourth of the Act proscribes "any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered."

The Board's Report further contends that an unjust discrimination—not founded upon any transportation differences—can be defended on grounds of con-

ference "self-protection" and "survival" (R. 60). Nothing in the Record not in the Board's Report, nor elsewhere, supports the proposition that the exclusive-patronage system is necessary for, or indispensable to, the survival or continuance of the conference system.[59] Even if the Board's unfounded observation concerning such need for the system were a fact—which it is not[60]—the argument is legally irrelevant. *No one has had the temerity to suggest that the Board could approve the "deferred rebate system" or the "fighting ship" because of some supposed essentiality of those prohibited devices to the survival of the conference system.* These same arguments of indispensability were offered unsuccessfully in defense of the exclusive-patronage *deferred*-rebate system, before that system was specifically prohibited by the Shipping Act of 1916. In *Thomsen* v. *Cayser*, 243 U.S. 66, 87, 88 (1917), which case arose just before the enactment of the Shipping Act of 1916, this Court rejected these traditional—and still persisting—arguments of the Conferences that exclusive-patronage arrangements were necessary and were beneficial to commerce in producing "regularity of service" and "stability of rates",

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[59] Ironically enough, the only example furnished by the Board here of "cut-throat" competition, which the system is supposed to avoid, was the rate war started by the Conference itself on March 12, 1953 (R. 12).

[60] There is no support in the Board's findings of fact for the proposition that the exclusive-patronage system is essential for the continuance of the conference system. All evidence is, in fact, to the contrary. According to the Board's own records, of the 125 conferences under its jurisdiction, only 62 use the system, and only 7 of these conferences, at most, have any alleged non-conference competition whatsoever.

phrases used throughout the Briefs of the Board and Conference [For example, see Bd. Br., pp. 32, 33]. In its decision holding the exclusive-patronage deferred rebate systems, there involved, to be in violation of sections 1 and 2 of the Sherman Act, this Court answered the plea of the monopolists concerning the claimed beneficial results of their monopoly as follows:

> "... and it finds no justification in the fact that defendants' 'contributions to trade and commerce' might 'have been withheld.' This can be said of any of the enterprises of capital, and has been urged before us to exempt them from regulation even when engaged in business which is of public concern. *The contention has long since been worn out* and it is established that the conduct of property embarked in the public service is subject to the policies of the law." 243 U.S. at 88.

B. The Board Has No Discretion Ever To Approve the System Because It Involves Persons, as Parties, Who Are Not Subject to the Shipping Act

Section 15 of the Shipping Act provides for an extraordinary privilege, that of exempting certain agreements from the provisions of the Anti-Trust Laws. *Only agreements between "common carriers" and "other persons subject to this Act,"* however, can ever receive such exemptions. Shippers, in their capacity as shippers, *are neither "common carriers" nor "other persons" subject to the Act*, as those expressions are defined in Section 1 of such Act. *The present exclusive-patronage system involves, as its main and essential constituent, an exclusive-patronage contract to be*

entered into between the Conference (and its member lines) and shippers. Such contracts or agreements with shippers as parties cannot be approved by the Board under the clear language of section 15, and consequently *cannot receive any immunity from the Anti-Trust Laws.* While the conference system, as such, may have immunity from the Anti-Trust Laws, the exclusive-patronage dual-rate system can never receive any immunity.[61]

Stripped of any color of immunity, there can be little doubt that the system violates Sections 1 and 2 of the Sherman Act, 15 U.S.C., because it is an admitted combination or conspiracy formed with the purpose of restraining commerce, eliminating, suppressing, and preventing competition, and attempting to monopolize the trade. *The Court of Appeals—in the previous appeal of this very Japan-Atlantic case—recognized that, unless such agreements can be approved by the Board under Section 15 of the Act, they are "subject to the operation of the Anti-Trust Laws, under which price fixing agreements are illegal per se." Isbrandtsen Company* v. *United States,* 211 F. 2d 51 (1954). Board and Conference Petitions for Writ of Certiorari in that case were denied by this Court, *Japan-Atlantic & Gulf Freight Conference* v. *United States,* 347 U. S. 990 (1954).

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[61] Prior to the *Isbrandtsen* case, *supra*, which required the filing for and approval of a dual rate system, the Board took the position that rates under a dual rate system were filed merely as tariff information, to which filing there was sometimes appended the form of shippers' contract employed. This was likewise considered a mere filing, and the Board paid no other attention to either filing.

Certainly, insofar as the Sherman Act is concerned, the essential purpose of the exclusive-patronage system and the method of accomplishing it are no different than those of the exclusive-patronage deferred-rebate system—which was specifically outlawed by the Act. The case of *Thomsen* v. *Cayser, supra,*—arising just before the passage of the Shipping Act—constitutes a clear-cut holding of this Court that the exclusive-patronage systems violate sections 1 and 2 of the Sherman Act. If the exclusive-patronage system in the *Thomsen* case had been this instant *pre*ferred-rebate system, rather than the *de*ferred-rebate system, the result would have been the same, and there has been no legislation, since that time, exempting the exclusive-patronage *pre*ferred-rebate system, or any other similar system, from the Anti-Trust Laws.

C. The Board's Interpretation of the Statute Would Render Section 15 of the Shipping Act Unconstitutional.

There are two fundamental reasons why the Board's interpretation of Section 15 of the Shipping Act, as authorizing the possible approval of exclusive-patronage systems, would render that section of the Act unconstitutional, namely, first, it would constitute an unlawful delegation of legislative authority to an administrative agency, which in this case would be redelegated to private individuals, in violation of Article I, Section 8, of the Constitution of the United States, and, secondly, it would result in an unlawful deprivation of private property, without *Due Process of Law.*

There can be no question but that the Board is required to observe a strict interpretation as to the legitimate purpose of Section 15 of the Shipping Act, inasmuch as it provides for a departure from prior public policy, the common law, and the provisions of the Anti-Trust Laws. The Board's interpretation of the Shipping Act, insofar as such interpretation contemplates possible approval of the exclusive-patronage system—would render Section 15 of the Act unconstitutional, as an unlawful *delegation of legislative* authority, in violation of Article 1, Section 8, paragraph 18 of the Constitution of the United States. *Schechter Corporation* v. *United States*, 295 U. S. 495 (1935); *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935); *Fashion Originators' Guild of American* v. *Federal Trade Comm.*, 312 U.S. 457, 465 (1941).

The Board's interpretation would confer upon the Conference, a private cartel, the absolute power to exclude any independent carrier from the trade unless the independent joined the Conference, dominated by foreign lines, and accepted all the terms of the Conference Agreement and all Conference rules and regulations. The conferring of such authority on the Board would, moreover, violate the due process clause of the Fifth Amendment, as exceeding the extent of permissible deprivation or property without due Process of Law. Admittedly, the exclusive-patronage system is intended to achieve and to perpetuate a monopoly for the Conference and to force all independent competition either into the Conference or out of business (See *supra*, pp. 78 to 79). "This is coercion by economic pressure. The asserted power of choice is

illusory." *United States* v. *Butler*, 297 U.S. 1, 71 (1936).

In *Frost Trucking Company* v. *Railroad Commission of California*, 271 U.S. 583 (1925), the question arose as to the constitutionality of a California statute which prohibited a motor carrier from operating on the public highways of the State unless he had obtained a certificate of public convenience and necessity as a *common carrier*. The Frost Company was a *contract carrier* and was ordered by the State to suspend operations until a certificate as a common carrier had been obtained. The statute was held unconstitutional by this Court as violative of the due process clause of the 14th Amendment. It was held by this Court that even a State cannot consistently with the due process clause require a private carrier to become a common carrier against his will. Certainly the Federal Maritime Board could not consistently with due process require a non-conference carrier to become a conference carrier against his will, much less could it pass on such a predatory power to private parties.

Although this argument and the *Frost case* have often been cited in the briefs of Isbrandtsen before the Board and in the Courts, neither the Board's Report nor the present Briefs of the Board and Conference contain any reference to it.

The vice of the predatory power—passed on by the Board to the Conference—is even more alarming when it is recognized that the exclusive-patronage system would be applicable to "all commodities moving in the trade." This includes bulk commodities, often carried in full ship loads by tramps. The exclusive-patronage

system is thus intended to prevent and to suppress all independent competition, *viz.*, both common carriers and contract carriers or "tramps" alike. For the Conference to reply that any shipper, *needing to ship a full ship load by a tramp,* might receive the gracious permission of the Conference—*after a possible wait of 20 days*—is no answer to the illegality of the overall inclusion of even tramp cargo. This is but one example of the persistent attitude of these private cartels that they can pick and choose as to when and where they will or will not enforce the provisions of the exclusive-patronage contract. Even that professed attitude of "benevolent" discretion in itself brands the whole arrangement as unlawfully discriminatory.

Furthermore, the opportunity extended to the Conference to extend its monopolistic control *over "all shipments" of the contract shipper,* even his bulk commodities, which normally move in full shipload lots, or "tramp" service, is enhanced by the well-known fact that many conference lines, from time to time, operate tramp vessels themselves. Under the particular exclusive-patronage contract of the Japan-Atlantic Conference, the shipper agrees unqualifiedly "to forward or cause to be forwarded *by the vessels of the carriers all shipments* made directly or indirectly by him . . ." in the Conference trade. The contract thus is not limited to any particular commodity, nor does the phrase, the "vessels of the carriers", limit, in any way, the obligations of the shipper to *those vessels of the Conference* lines which operate in common carrier, or so-called "berth" or "liner" service.

On the other side of the picture, the Conference lines, as has been pointed out previously, and as admitted on page 5 of the Conference Brief, *do not undertake to provide any specific amount of service, nor do they guarantee to carry all of the cargo the shipper may offer.* The exclusive-patronage contract provides that the Conference lines "agree to carry the shipper's cargoes [only] so far as their regular services are available. . . ". The viciousness of this situation is astounding, when it is considered that the Conference lines can, under the terms of the contract, force a shipper to use "tramp" or contract carrier vessels of the Conference lines, but that the *shipper signing the contract could not patronize a company not belonging to the Conference, which operated only "tramp" vessels, and the latter type of company could not possibly join the Conference, because it would not be eligible under Section 15, not being a "common carrier".*

While Isbrandtsen, as a common carrier engaged in regular liner operations, might possibly be able to postpone its elimination from business, if the exclusive-patronage system were to be instituted, by joining the foreign-dominated Conference, *such a solution is not even open to contract or tramp carriers, with which operators Conference lines are continuously in competition,* and the Board and Conference have strenuously urged that type of competition as a ground for allowing them to employ the system. It has traditionally been argued by the Board and the Conferences that any non conference operator can relieve himself

of any disadvantage by "joining up" with the Conference. Such an unconscionable solution, however, it must be emphasized, is not open to the tramp operator, because *only "common carriers" are subject to the Shipping Act*, and tramp and other private or contract carriers are explicitly excluded from regulation; such carriers are *not* permitted to form conferences under Section 15 and cannot join conferences that have already been formed and are in existence. Thus, even if the alarming arguments of the Board and conferences, that the Independent can join the Conference if he sees fit to stay in business, were otherwise valid, such arguments are completely invalidated in the case of the tramp.

For about ten years Isbrandtsen has struggled to compel the Board and its favored conferences to face up to all the foregoing evasions and alibis to which they have resorted in order to perpetuate a transportation scheme which has always been unlawful, at common law, under the Anti-Trust Acts and under the Shipping Act. We have now arrived at the final showdown.

Conclusion

On the basis of the sound and thorough consideration of the law, in the opinion of the Court below, holding the exclusive-patronage system illegal under Section 14, Third of the Shipping Act, and for the additional reasons related herein concerning the illegality of said system under Sections 15, 16 and 17 of said Act and the violation by said system of the Constitu-

tion of the United States, the Judgment of the Court below should be Affirmed.

Respectfully submitted,

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WASHINGTON, D. C.

Certificate

I, John J. O'Connor, Counsel for Isbrandtsen Company, Inc., and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 14 day of October, 1957, I served copies of the foregoing Brief on counsel for all parties of record by mailing copies to their offices in duly addressed envelopes with postage prepaid, or by delivery to them in person.

JOHN J. O'CONNOR.

APPENDIX A

Statutes Involved

A. Pertinent Parts of Shipping Act of 1916 (46 U.S.C. § 801, et seq.):

§ 14 (46 U.S.C. 812):

Rebates and discriminations by carriers by water prohibited; use of "fighting ship"

No common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

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Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

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§ 15 (46 U.S.C. 814):

Contracts between carriers filed with commission

Every common carrier by water, or other person subject to this chapter, shall file immediately with the commission a true copy, or, if oral, a true and complete memorandum, of every agreement, with

another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The commission may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the commission shall be lawful until disapproved by the commission. It shall be unlawful to carry out any agreement, or any portion thereof disapproved by the commission.

All agreements, modifications, or cancellations made after the organization of the commission shall be lawful only when and as long as approved by the commission, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

§ 16 (46 U.S.C. 815):

Discriminatory acts prohibited

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That it shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

First, To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

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§ 17 (46 U.S.C. 816):

Discriminatory rates prohibited; supervision by commission

No common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the commission finds that any such rate, fare, or charge is demanded, charged, or collected, it may after the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

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B. Relevant Parts of the Constitution of the United States:

Article I, Sec. 1:

"All legislative power herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Article I, Sec. 8, par. 18:

"The Congress shall have power to * * * make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers * * *."

Amendment, Article V:

"No person shall be held to answer for a capital, or otherwise infamous crime unless, on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

C. Sections 1 and 2 of the Sherman Anti-Trust Act (15 U.S.C. Secs. 1, 2):

SHERMAN ACT[1]

[*Contract, Combination or Conspiracy in Restraint of Interstate or Foreign Commerce Illegal; Penalty*]

Sec. 1. [26 Stat. 209; 50 Stat. 693; 15 U.S.C. § 1.] Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided*, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears,

[1] Act of July 2, 1890, c. 647, 26 Stat. 209, 51st Cong., 1st Sess. (S. 2, Public 190), as amended by Act of March 3, 1911, c. 231, 36 Stat. 1167, and Act of Aug. 17, 1937 ("Miller-Tydings" Act), c. 690, 50 Stat. 693, 75th Cong., 1st Sess. (H. R. 7472, Public 314).

or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes", approved September 26, 1914: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

[*To Monopolize, Attempt to Monopolize, Combine or Conspire a Misdemeanor; Penalty*]

Sec. 2 [26 Stat. 209; 15 U.S.C. § 2.] Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.